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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 63

THE HODGE DRIVE-IT-YOURSELF COMPANY, THE BARRS SELF DRIVER COMPANY, INC., AND DURKEN DRIVE-IT-YOURSELF, INC., APPELLANTS,

vs.

THE CITY OF CINCINNATI, RUSSELL WILSON, CLARENCE DYKSTRA, ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED MAY 1, 1931

(35,848)

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[fol. 1] Certificate of transmittal omitted in printing.

[fol. 2]

IN SUPREME COURT OF OHIO

THE HODGE DRIVE-IT-YOURSELF COMPANY, THE BARRS SELF Driver Company, Inc., and Durken Drive-It-Yourself, Inc., Appellants,

vs.

THE CITY OF CINCINNATI, a Municipal Corporation; Russell Wilson, Mayor of said City; Clarence Dykstra, Manager of said City; Edgar Dow Gillman, Director of Public Utilities of said City; Stephen W. McGrath, Treasurer of said City, and William Copelan, Chief of the Police Department of said City, Appellees

PETITION FOR ALLOWANCE OF APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed Mar. 26, 1931

Considering themselves aggrieved by the final decision of the Supreme Court of the State of Ohio in the above entitled cause, appellants hereby pray that they be allowed an appeal, and for an order fixing the amount of the bond thereon.

Assignment of Errors

The said appellants assign the following errors in the record and proceedings in the said cause, that the Supreme Court of the State of Ohio erred:

1. In holding that the business of leasing automobiles to be driven by lessees is a use by the lessor of the public streets for gain, and not a use by said lessor as a member of the public in the ordinary way.

2. In holding that a separate classification for regulation purposes of automobiles kept and used for the purpose of [fol. 3] renting them to be driven by lessees, is not an unreasonable classification.

3. In holding that the police power of a municipality to regulate the use of automobiles leased to persons to be driven by such lessees, is not dependent upon such automobiles being operated as a common carrier.

4. In holding that the police power of a municipality to regulate the use of automobiles leased to persons to be driven by such lessees, is not dependent upon the business of leasing such automobiles, being one impressed with a public interest.

5. In holding that the power of a municipality includes the power to regulate the business of leasing automobiles to be driven by lessees, and that such power is as great as the power of the state to regulate.

6. In holding that Ordinance No. 50-1929 of the Ordinances of the City of Cincinnati, and especially Sections 65-lb, 65-le, 65-3, 65-7, 65-8, 65-9, 65-10, 65-11, 65-13, 65-42, 65-47 and 65-48, is within the police power of the municipality, and that the said ordinance and the respective sections thereof are valid and constitutional and not repugnant to or violative of Section 1 of Article 14 of the Amendments to the Constitution of the United States.

7. In holding that said ordinance and the respective sections thereof did not convert property used exclusively in the business of a private carrier into a public utility, or make the owner of the vehicle a public carrier, by legislative fiat.

8. In holding that said ordinance and the respective sections thereof did not impose upon appellants a liability without fault and did not impose upon appellants as owners of automobiles leased, a liability exempt under the common law.

9. In holding that said ordinance and the respective sections thereof was not unreasonable, oppressive and unworkable.

Appellants claim that said Ordinance No. 50-1929 of the Ordinances of the City of Cincinnati, and the sections thereof aforesaid, are invalid and unconstitutional in that they violate Section 1 of Article 14 of the Amendments of the United States Constitution, and by the terms of said ordinance appellants are deprived of their property with-

[fol. 4] out due process of law and are denied the equal protection of the laws, for the following reasons:

1. Said ordinance and the respective sections thereof attempt to regulate a purely private business, not impressed with any public character, and therefore is not within the police power of the municipality.

2. Said ordinance and the respective sections thereof attempt by legislative fiat to convert property used exclusively in the business of a private carrier, or in a private business, into a public utility or to make the owner thereof a public carrier, resulting in depriving appellants of their property without due process of law.

3. Said ordinance and the respective sections thereof attempt to impose upon appellants as owners of vehicles leased to be driven by lessees, liability without fault, and a liability from which they are exempt under the common law, resulting in depriving appellants of their property without due process of law and denying to them the equal protection of the laws.

4. Said ordinance, and the respective sections thereof, is discriminatory as to appellants and the classification for regulation purposes of the automobiles leased by them is unreasonable, resulting in denying to appellants the equal protection of the laws.

5. Said ordinance, and the respective sections thereof, is harsh, oppressive, impracticable and unworkable.

Prayer for Reversal

For which errors appellants pray that the said judgment of the Supreme Court of the State of Ohio, dated February 11, 1931 (application for rehearing denied March 12, 1931) in the above entitled cause be reversed and a judgment rendered in favor of said appellants, and for costs.

Julius R. Samuels, Counsel for Appellants.

[fol. 5] [File endorsement omitted.]

[fol. 6] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER ALLOWING APPEAL FROM THE SUPREME COURT OF OHIO TO THE SUPREME COURT OF THE UNITED STATES—Filed Mar. 26, 1931.

The above entitled cause came on to be heard on the petition of appellants for allowance of appeal to the Supreme Court of the United States, and upon examination of said petition and desiring to give appellants an opportunity to present to the Supreme Court of the United States the questions presented by the record in said cause;

It is therefore ordered that the appeal prayed for by appellants to the Supreme Court of the United States from the judgment heretofore filed and entered herein on February 11, 1931 (application for rehearing of which was filed and entered on March 12, 1931), which is the final judgment of the highest court of the State of Ohio, be and the same hereby is allowed, and that a certified copy of the transcript of the record be forthwith transmitted to the Supreme Court of the United States.

It is further ordered that the bond on appeal, to act as a supersedeas, be and the same is hereby fixed at $5,000.00.

Carrington T. Marshall, Chief Justice, Supreme Court of the State of Ohio.

[fol. 7] [File endorsement omitted.]

[fols. 8-10] Citation, in usual form showing service on City of Cincinnati, filed March 26, 1931, omitted in printing.

[fol. 11] IN SUPREME COURT OF OHIO

[Title omitted]

SUMMONS AND SEVERANCE—Filed Mar. 26, 1931

Mr. John J. Brady, Mr. William A. Brady, and Mr. Philip A. Brady, partners, doing business as the Brady Taxicab and Driverless Company, Cincinnati, Ohio:

The undersigned, desiring to appeal to the Supreme Court of the United States from the final judgment of the Supreme

Court of the State of Ohio in the above entitled cause, hereby request you to join in their petition for the allowance of an appeal.

In the event you do not join with the undersigned in the petition for an appeal to the Supreme Court of the United States from the Supreme Court of the State of Ohio in the above entitled cause on or before March 25th, 1931, the undersigned appellants will proceed with their appeal without you.

The Hodge Drive-It-Yourself Company, The Barrs Self-Driver Company, Inc., Durken Drive-It-Yourself, Inc., by Julius R. Samuels, Counsel.

[fol. 12] STATE OF OHIO,
County of Hamilton, ss:

William H. Hodge, being first duly sworn, deposes and says that on the 23rd day of March, 1931, he served upon The Brady Taxi-cab and Driveless Company a copy of the foregoing Summons and Severance by leaving a copy thereof with Mr. William A. Brady, a member of the firm of The Brady Taxi-cab and Driverless Company.

William H. Hodge.

Sworn to before me and subscribed in my presence this 24th day of March, 1931. Julius R. Samuels, Notary Public in and for Hamilton County, Ohio.

[fol. 13] [File endorsement omitted.]

[fol. 14] IN SUPREME COURT OF OHIO

[Title omitted]

PRÆCIPE AS TO TRANSCRIPT OF RECORD—Filed Mar. 26, 1931

To the Clerk:

You are hereby directed to prepare a transcript of, certify and transmit to the clerk of the Supreme Court of the United States the entire record in this cause, together with all pleadings and papers filed in this court.

Julius R. Samuels, Attorney for Plaintiffs in Error.

Cincinnati, Ohio, March 26, 1931.

Cincinnati, Ohio, March 26, 1931.

Receipt is hereby acknowledged of a copy of the Pr-ecipe addressed to the Clerk of the Supreme Court of Ohio, to prepare a transcript of the record in the above entitled case.

Jacob Hauptman, Ass't Solicitor of the City of Cincinnati, Counsel for Defendants in Error.

[fol. 15] [File endorsement omitted.]

[fol. 16] IN SUPREME COURT OF OHIO

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES

No. 22323

Title

THE HODGE DRIVE-IT-YOURSELF COMPANY, THE BARRS SELF Driver Company, Inc., Durken Drive-It-Yourself, Inc., Brady Taxicab & Driverless Company, a Partnership, Consisting of John J. Brady, William A. Brady, and Phillip H. Brady,

vs.

THE CITY OF CINCINNATI, a Municipal Corporation; RUSSELL Wilson, Mayor of said City; Clarence O. Sherrell, Manager of said City; Edgar Dow Gilman, Director of Public Utilities of said City; Stephen W. McGrath, Treasurer of said City, and William Copelan, Chief of the Police Department of said City

Action: Error to the Court of Appeals of Hamilton County

Attorneys:

For plaintiffs: Julius R. Samuels, Cincinnati, O.

For Defendants: John D. Ellis and Milton H. Schmidt, Cincinnati, Ohio.

Memoranda of Pleadings, &c., Filed, Writs Issued, Judgments, Orders, and Decrees

1930.

May 8. Petition in Error, Waiver of Summons & entry of appearance filed, affidavit of plffs. attorney filed.

1930.

May 8. Court of Appeals Transcript, Common Pleas Court Transcript, Original Papers & Bill of Exceptions filed.

" " Application for Temporary Restraining Order & Notice of application filed.

" " Order Granting Temporary Restraining Order. Bond in sum of $5,000.00, approval of Clerk of Supreme Court. Approved R. H. Day, J. Journal 32-194.

" " Papers taken by Toothaker & Rodenfels.

" 12. Application to dispense with printing exhibits filed.

" " Order allowing application to dispense with printing exhibits by R. H. Day, J. Jour. 32-195.

" 15. Stipulation filed.

" 16. Injunction bond in sum of $5,000.00 approved and filed.

[fol. 17]

June 2. Papers returned.

" " Application for extension of time for printed brief of plff. filed.

" " Order extending time for plffs'. brief to July 7, 1930 Rob't H. Day, Judge. Jour. 32-205.

" " Printed record and affidavit of service filed. 6-6-30 P. S. filed.

" 26. Printed brief of plff. in error on merits & P. S. filed.

Sept. 29. Brief of defendant in error (12) and P. of S. filed.

Oct. 14. Printers Receipted bill filed.

1931.

Feb. 11. Judgment affirmed. Jour. 32-323.

Feb. 19. Mandate issued.

" 25. Application for rehearing filed, 2-27-31 P. S. filed.

Mar. 12. Rehearing Denied. Jour. 32-344.

" 26. Petition for allowance of Appeal, assignments of Errors & Prayer for reversal filed.

" " Order allowing Appeal from the Supreme Court of Ohio to the Supreme Court of the United States filed.

" " Citation, Summons & Severance filed.

" " Precipe as to transcript of record filed.

Apr. 8. Bond on Appeal to Supreme Court of United States approved and filed.

Journal Entries in Supreme Court of Ohio

Thursday, May 8, 1930.—Order Granting Temporary Restraining Order. This cause came on this day to be heard upon the application of the plaintiffs in error, in the above entitled cause, for a temporary restraining order, pending the final disposition of this cause in this Court, and upon the affidavit of Julius R. Samuels, in support of said application, and due notice of the time for hearing said application having been served upon the attorney for defendants in error; and it appearing to the Court from a consideration of said application, and affidavit, that the plaintiffs in error are entitled to a temporary restraining order,

It is therefore ordered and adjudged, that a temporary restraining order be, and it is hereby granted, restraining the defendants in error; The City of Cincinnati, a Municipal; Russell Wilson, Mayor of said City; Clarence O. Sherrell, Manager of said city; Edgar Dow Gilman, Director of Public Utilities of said City; Stephen W. McGrath, Treasurer of said City; and William Copelan, Chief of the Police Department of said city, and each of them, from enforcing, or attempting to enforce, Ordinance No. 50-1929 of the Ordinances of the City of Cincinnati and especially sections 65-1b; 65-1e; 65-2; 65-3; 65-5; 65-7; 65-8; 65-9; 65-10; 65-11; 65-13; 65-42; 65-45; 65-47; and 65-48 of said Ordinances; that they an- each of them, be restrained from insisting upon and demanding of plaintiffs in error the delivery of insurance policies or bonds in lieu thereof, as provided in said ordinance; that they, and each of them, be [fol. 18] restrained from interfering with the operation of the business of plaintiffs in error, and that they be restrained from interfering with the operation of the automobiles owned by plaintiffs in error, and operated by the persons to whom such automobiles may be leased or rented; that they and each of them be restrained from instituting criminal proceedings against said plaintiffs in error, or any of them, or their agents or servants and employees, or the persons who may rent or lease their said automobiles.

Said defendants in error, and each of them, are hereby restrained and enjoined from taking any further proceedings under, or based upon, the judgment in case No. 3602 on the docket of the Court of Appeals of the first Appellate District of Hamilton County, Ohio, during the pendency

of this proceeding in error, upon plaintiffs in error executing bond in the sum of Five Thousand ($5,000.00) Dollars, to the approval of the Clerk of this Court. Julius R. Samuels, Attorney for the Plaintiffs in error; John J. O'Donnell, Asst. Solicitor, for defendants in error. Approved: Robert H. Day, Judge, Supreme Court. Jour. 32-194.

Monday May 12, 1930.—This matter came on to be heard upon the application of plaintiffs in error, for authority to dispense with the printing of plaintiff's exhibits 4 and 5, and defendant's exhibits "A" and "B", attached to the Bill of Exceptions in the above entitled cause, was submitted to the Court, on consideration whereof the Court finds that said application is well taken and should be granted.

It is therefore ordered, that the printing of plaintiffs' Exhibits 4 and 5, and defendants' Exhibits "A" and "B", attached to the Bill of Exceptions in the above entitled case be, and the same is, hereby dispensed with. Approved: R. H. Day, J. Jour. 32-195.

Tuesday, June 3, 1930.—Upon application of Toothaker & Rodenfels and for good cause shown, it is ordered that the time for filing printed briefs of plaintiff in error herein be, and the same hereby is, extended until July 7, 1930. Jour. 32-205.

Wednesday, February 11, 1931.—Error to the Court of Appeals of Hamilton County. This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Hamilton County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the Judgment of the Court of Appeals be and the same hereby is affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendants in error recovery from the plaintiffs in error its costs herein expended, taxed at $—. Ordered, That a special mandate be sent to the Court of Appeals of Hamilton County, to carry this judgment into execution. Jour. 32-323.

Thursday, March 12, 1931.—It is ordered by the Court that the application for rehearing filed in the above entitled case be, and the same hereby is, denied. Jour. 32-344.

[fols. 19-21] Bond on appeal for $5,000, approved and filed April 8, 1931, omitted in printing.

[fol. 22] [File endorsement omitted]

[fol. 23] IN SUPREME COURT OF OHIO

[Title omitted]

APPLICATION FOR REHEARING—Filed Feb. 25, 1931

Now come the Plaintiffs in Error, by their attorney, Julius R. Samuels, and respectfully ask the Court for a rehearing in the above entitled cause, for the following reasons:

1. The Court has upheld the validity of the ordinance in question, relying, among other cases, upon that of San Antonio vs. Besteiro, 209 S. W., 472, but has ignored the later case by the same court, to-wit, Genuso vs. City of Houston, 10 S. W., (2nd), 772, wherein that Court held that the ordinance in question was invalid insofar as it related to the requirements of insurance policies or bonds.

2. The Court's decision in this case is based primarily upon the authority of the city to regulate the use of automobiles, etc., and to license and regulate the use of streets [fol. 24] by persons who use vehicles, or solicit or transact business thereon; in other words, upon the theory that Plaintiffs in Error are using the public streets for gain.

While the customers of Plaintiffs in Error do use the public streets of the city just as any other driver of a vehicle does, this does not justify the strict regulations set forth in the ordinance. The provisions of the ordinance, under the guise of regulating traffic, is in fact a regulation of a private business not impressed with public interest.

Clearly, a statute or municipal ordinance attempting to regulate a private business, directly, would not be upheld; neither should it be upheld where the regulation is indirectly, rather than directly.

As was stated in the case of City of Rockford vs. Nolan, 316 Ill., 60:

"The power to open and improve streets and public ways and to regulate their use * * * does not include the licensing of an occupation or business."

In that case the Supreme Court of Illinois held a somewhat similar ordinance to be invalid.

3. The ordinance in question attempts to create, in effect, liability without fault. While it is true that the ordinance does not attempt either to make Plaintiffs in Error liable as common carriers, or to make them responsible directly for the tortious acts of their lessees under the doctrine of respondeant superior, yet, it does that indirectly. The burden upon Plaintiffs in Error is not much less through this indirect method, than it would be if the ordinance should attempt to create a liability direct.

The protection of the general public, intended by the ordinance, is only incidental, and has been shown as having little practical value. The gist of the ordinance is an indirect interference with a private business not impressed with a public interest.

Wherefore Plaintiffs in Error respectfully ask the court to reconsider the opinion it has rendered in this case, and to [fol. 25] grant a rehearing to the end that full and complete justice may be done to Plaintiffs in Error.

Julius R. Samuels, Attorney for Plaintiffs in Error.

[fol. 26] IN SUPREME COURT OF OHIO

No. 22323

Decided February 11, 1931

THE HODGE DRIVE-IT-YOURSELF CO. et al.

v.

CITY OF CINCINNATI et al.

Municipal corporations—Regulation of automobiles hired out or rented and driven by lessee—Lessor's use of streets for gain, and not as member of public—Police power not dependent upon automobile being operated as common carriers—Separate classification of rented automobiles, driven by lessee, not unreasonable—Police power limited only by public need for regulation.

1. The business of leasing automobiles to be driven by the lessee upon the public streets of a municipality is a use by the lessor of the public streets for gain and not a use by such lessor as a member of the public in the ordinary way.

2. The police power of a municipality to regulate the use of automobiles kept for hire, to be driven by the lessee, is not dependent upon such automobiles being operated as common carriers.

3. A separate classification, for regulation purposes, of automobiles kept and used for the purpose of renting them, to be driven by the lessees upon the public streets, is not an unreasonable classification.

4. The police power of a municipality to regulate automobiles kept and used for the purpose of renting them to be driven by the lessee upon the public streets of the municipality is limited only by the extent of the public need for such regulation in the promotion of the peace, safety and morals of the municipality.

Error to the Court of Appeals of Hamilton county

OPINION

This action was instituted in the court of common pleas of Hamilton county, where the parties stood in the same relation as they appear in this court. It has for its purpose the restraining of the various officials of the city of Cincinnati from enforcing the provisions of an ordinance, [fol. 27] hereinafter set forth, upon the ground that the ordinance is violative of the provisions of the Constitutions of the United States and the State of Ohio, specifically calling attention to the Fourteenth Amendment of the Constitution of the United States, and Section 1 of Article I, Section 16 of Article I, Section 19 of Article I, Section 1 of Article II, Section 26 of Article II, and Section 1 of Article IV, of the Constitution of the State of Ohio.

The pertinent sections of the ordinance are as follows:

Section 65-1b. The term "public vehicles" shall apply to all vehicles furnishing individual service as a business in

the transportation of persons, which are hereby classified as (1) public vehicles which seek their business, or a part thereof, on the public streets, or quasi-public places, to wit: "taxicabs," and (2) public vehicles which use the public streets for the purpose of transporting passengers for hire, but which do not seek their business thereon, or in quasi-public places, to wit: "autosforhire," "driverless autosforhire" and "funeral cars."

Nothing herein shall apply to vehicles furnishing mass service, such as street railway cars, motor busses and omnibuses, which move over fixed routes, or on a fixed schedule, or between fixed termini.

Section 65-1e. The term "driverless autosforhire" shall include any public vehicle which is rented or hired out to a person other than the owner, and operated by the person renting or hiring the same for his own use and not for the purpose of transporting persons for compensation.

Section 65-3. Application for Vehicle License.—Applications for licenses for public vehicles shall be made to the [fol. 28] director upon blanks provided by the director, and shall set forth the name and address of the applicant, the trade name under which he does business, the class of vehicle for which the license is desired, the seating capacity, the design, color scheme and lettering and marks to be used on said vehicle, and any other information required by the director. If the application is granted, the applicant shall furnish the director, prior to the issuance of the license tag, with information covering the particular vehicle to be licensed, such information to include the make, the state license number, the length of time the vehicle has been in use, the motor power thereof, and the name and address of the person, firm, or corporation from which the vehicle was purchased, and any other information required by the director.

Section 65-7. Liability Insurance Required.—No license to operate any public vehicle shall be issued or renewed by the city treasurer, and it shall be unlawful to operate any such public vehicle, or permit such to be operated, unless and until the applicant shall deposit with the city treasurer a policy or policies of liability insurance issued by a responsible insurance company, approved as to sufficiency by the city treasurer, and as to legality by the city solicitor, pro-

viding indemnity for or protection to the insured against loss in the amounts provided for in Sections 65-8, 65-9 and 65-10, and agreeing to pay within the limits of the amounts fixed in said sections to any judgment creditor who shall have filed his suit or filed notice of a claim for such loss with the city treasurer during the license year in which the injury occurred or six months thereafter any final judg-
[fol. 29] ment rendered against the insured by reason of the liability of the insured to pay damages to others for bodily injuries, including death, at any time resulting therefrom, and for damages to or destruction of property sustained during the term of said policy by any person other than employees of the insured, and resulting from negligent operation, maintenance or use of such licensed public vehicles.

The policy of insurance aforesaid and the bond given in lieu thereof, as hereinafter referred to, shall provide that in case the vehicle is operated, maintained or used with the consent or acquiescence of the owner, by one other than the owner, his agent or employee, and an injury results to person or property as indicated above, due to the negligent operation, maintenance or use of said vehicle, that the insurer or the obligors in the bond, as the case may be, shall pay to any judgment creditor of said person so maintaining, using or operating said vehicle any final judgment rendered against said person so maintaining, using or operating said vehicle, provided that said judgment creditor shall have filed his suit, or filed notice of claim for such loss in all respects as is provided for the judgment creditor of the insured in the foregoing paragraph.

The policy or policies of insurance, and the sureties hereinbefore required, shall be valid and effective for no less a period than that for which the license is issued.

Section 65-8. Extent of Liability.—The extent of the liability of the insurer shall be, as to any one licensed public vehicle, the sum of five thousand dollars ($5,000.00) on account of injuries to, or death of, any one person in any one
[fol. 30] accident; and subject to such limit as respects injury to, or death of, one person, ten thousand dollars ($10,000.00) on account of any one accident resulting in injury to or death of more than one person, and one thousand dollars ($1,000.00) on account of damage to property

in any one accident.

Section 65-9. Limitation of Liability for Property Damage.—In the case of property damage the insurer shall have the option of limiting his total liability as follows:

For not more than two public vehicles, $2,000.00.

For each vehicle in excess of two, not in excess of five, $1,000.00.

For each vehicle in excess of five, not in excess of ten, $750.00.

For each vehicle in excess of ten, not in excess of twenty-five, $500.00.

For each vehicle in excess of twenty-five, not in excess of fifty, $300.00

For each vehicle in excess of fifty, $200.00.

Section 65-10. Additional Insurance.—Any insurer limiting his total liability as to property damage in accordance herewith shall notify the city treasurer forthwith of any insurance payments made on behalf of applicant which would operate to reduce the outstanding total limited liability. The city treasurer shall thereupon require adequate additional insurance and in the event of the failure of applicant to furnish the same on ten days' notice, his license or licenses shall be suspended until the required additional insurance is provided. Failure of the insurer to notify the city treasurer shall operate to maintain the total liability of the insurer without allowance for payments made.

[fol. 31] Section 65-11. Bond in Lieu of Insurance.—In lieu of the policy or policies of insurance herein provided for applicant may furnish a bond executed by a surety company, authorized to do business in the state of Ohio, or by two personal sureties, approved as to sufficiency by the city treasurer and as to legality by the city solicitor, holding and binding the principal and sureties to the same liability, and subject to the same conditions as in the case of policies of insurance provided for hereunder. It shall further be permissible for the applicant to furnish insurance as to damages for personal injuries, including death, and an indemnity bond as to property damages, or vice versa.

Section 65-13. Metal Tag.—At the time the license is issued by the city treasurer to the owner of any public vehicle, the city treasurer shall also issue to such owner a metal tag showing the class of public vehicle, the license

number and the year for which issued. The tags for each class of public vehicle shall be numbered consecutively each year, except that tags for taxicabs shall be numbered to correspond to the body number assigned by the director. No tag shall be displayed on any public vehicle except the one for which it was issued. The tag shall be affixed to the front of the vehicle so as to be plainly discernible at all times.

Section 65-42. Director's Powers.—The director is authorized and empowered to establish and adopt such rules and regulations governing the issuance of public vehicle licenses and the inspection of public vehicles and their appurtenances as are reasonable and necessary, and not inconsistent with the terms of this division.

[fol. 32] Section 65-47. Violation Penalties.—Any person, firm, or corporation, or any owner, agent, employee, or driver of a public vehicle who violates any of the provisions of this division, for which no other fine and/or imprisonment is specified, shall be fined not less than five dollars ($5.00) nor more than one hundred dollars ($100.00).

For the habitual violation of the provisions of this division the city treasurer, upon recommendation of the director, shall revoke the license for the vehicle involved.

Section 65-48. Appeals.—Whenever the director shall have refused to authorize a public vehicle license, or whenever the city treasurer has suspended or revoked a public vehicle license, the applicant, within ten (10) days after receiving notice of such denial, suspension or revocation, may appeal to the city manager. The city manager may either consider said appeal on the evidence produced before the director, or permit the introduction of new evidence, inspections, and tests. The decision of the city manager shall be final.

Provided, however, that when the director's refusal of a license shall be upon the grounds of public necessity and convenience, then the applicant, within ten days after receiving notice of such refusal, may appeal to the city council. The council may either consider said appeal on the evidence produced before the director or permit the introduction of new evidence, inspections, and tests. The decision of the city council shall be final.

By the pleadings an issue was made, both of law and fact.

The evidence in the case disclosed that the plaintiffs are [fol. 33] each owners of a number of automobiles, and are engaged in the business of leasing such automobiles upon a mileage basis to persons, to be driven by the lessees upon the streets of the city of Cincinnati and upon the public highways; that many insurance companies never have carried the character of risk provided in the ordinance, and that certain insurance companies which at one time had carried the character of risk provided in the ordinance have discontinued carrying such risk; that certain insurance companies authorized to write insurance in the state of Ohio are now willing to write and are writing such insurance, and such companies offer an option of a flat rate of $232.50 per automobile, or a rate based upon the gross earnings of each automobile insured, slightly under 10 per cent. of such earnings; that certain of the plaintiffs are now carrying insurance in compliance with the ordinance; that the average gross earnings of an automobile in this character of service is approximately $1,800 per year, and that plaintiffs find it advisable to exchange each automobile for a new one after eight or nine months' service. The comparative trade-in value of the automobile does not appear from the record.

The cause was heard in the court of common pleas, which found for the plaintiffs and enjoined the city and its various officials from enforcing the provisions of the ordinance against the plaintiffs. The cause was appealed to the Court of Appeals, and, upon hearing, judgment was rendered for the defendants. The cause is here upon a petition in error.

Mr. Julius R. Samuels for plaintiffs in error.

Mr. John D. Ellis, city solicitor, Mr. Jacob Hauptman, [fol. 34] and Mr. Milton H. Schmidt for defendants in error.

ROBINSON, J.:

This case involves the validity of certain sections of an ordinance of the city of Cincinnati, regulating the operation of the business of leasing automobiles, to be driven by the lessee upon the public streets of that city.

It is contended that the business is purely private and not impressed with any public character which makes it subject to police regulation.

Concededly, the automobiles are rented on a mileage basis and for operation over the public streets; so that for every mile of travel for which a rental fee is exacted of the lessee a mile of public street has been used in earning such rental fee, and, while the use of the public streets by the lessee has been a use of such streets by a member of the public in the ordinary way, such use by the lessor has been a use for his own gain, just as the use of the streets by street cars, busses and taxicabs is a use by them for their own gain.

While there is a marked difference between the relationship and liability of street cars, busses, and taxicabs to the public and the relationship and liability to the public of the lessor of an automobile to be driven by the lessee, there is no difference in the pecuniary character of their use of the street. The power to classify the users of public streets for gain, such as busses, taxicabs, jitneys, and the like, for the purpose of regulation, has been so uniformly upheld that it has ceased to be a question. State, ex rel. McBride, v. Deckebach, Auditor, 117 Ohio St., 227, 157 N. E., 758; Fifth Ave. Coach Co. v. City of New York, 194 N. Y., [fol. 35] 19, 86 N. E., 824, 21 L. R. A. (N. S.), 744, 16 Ann. Cas., 695; Id., 221 U. S., 467, 31 S. Ct., 709, 55 L. Ed., 815; Packard v. Banton, Dist. Atty., 264 U. S., 140, 44 S. Ct., 257, 68 L. Ed., 596; Pacific Express Co. v. Seibert (C. C. Mo.), 44 F., 310; Id., 142 U. S., 339, 12 S. Ct., 250, 35 L. Ed., 1035.

We do not find it necessary to determine whether the city of Cincinnati derives its power to enact the ordinance in question under the home-rule provision of the Constitution of Ohio, since, if the power be not there conferred, it has been specifically conferred by Section 3632 of the General Code of Ohio, which provides that municipalities shall have the power "to regulate the use of * * * automobiles * * * kept for hire * * *."

The power of the municipality, within its jurisdiction, in reference to regulating the business of leasing automobiles to be driven by the lessee, is as great as that of the state within its jurisdiction.

The plaintiffs are not common carriers. The lessees of plaintiffs are not the agents of the lessors, and the ordinance does not attempt either to make plaintiffs common carriers or to make them responsible for the tortious acts of their lessees, under the doctrine of respondeat superior.

It does, by appropriate language, undertake to require that the financial responsibility of the lessees of such automobiles, to respond in damage for their own tortious acts in the operation of such automobiles, be guaranteed either by a liabilty insurance policy, or by a bond; and it imposes upon the lessor of such automobile the burden of securing such policy or bond, and makes the assumption [fol. 36] of such burden a condition precedent to the issuing of a license to such lessor to transact such business within the city.

It is a matter of common knowledge that a consciousness of financial responsibility for negligence tends to promote care, and, conversely, that a consciousness of financial irresponsibility tends to promote indifference. The mode of operation of the business of plaintiffs is designed to make use of the public streets in a gainful occupation without incurring any financial obligation for the manner of use, such as is incurred by both common carriers and owners of automobiles using the streets in the ordinary way.

The evidence in this case discloses that the hazards of insuring leased automobiles, to be driven by the lessee, against liability for injury to persons and property, are such that many insurance companies engaged in the business of writing liability insurance upon automobiles are unwilling to write such insurance, and that the insurance companies that are willing to write such insurance exact a high premium rate. The fact that automobiles of this class are operated by persons who have no ownership in the operated automobiles—and that they operate under a contract which exempts the owner from the application of the doctrine of respondeat superior, which operation has been found by the experience of insurance companies and insurance men skilled in the occupation of determining degrees of hazard to be extra hazardous to the public—is quite sufficient to warrant a classification of this character of automobiles, separate from all others, and to warrant a reasonable regulation of the class. In re Cardinal, 170 Cal., 519, 150 P., 348, L. R. A., 1915F, 850; People v. Mar- [fol. 37] tin, 203 App. Div., 423, 197 N. Y. S., 28, affirmed, 235 N. Y., 550, 139 N. E., 730; City of Dallas v. Gill (Tex. Civ. App., 1917), 199 S. W., 1144; Hazleton v. City of Atlanta, 144 Ga., 775, 87 S. E., 1043; West v. City of Asbury Park, 89 N. J. Law, 402, 99 A., 190; Commonwealth

v. Theberge, 231 Mass., 386, 121 N. E., 30; Huston v. City of Des Moines, 176 Iowa, 455, 156 N. W., 883; State v. Seattle Taxicab & Transfer Co., 90 Wash., 416, 156 P., 837; Melconian v. City of Grand Rapids, 218 Mich., 397, 188 N. W., 521; Lane v. Whitaker, (D. C.), 275 F., 476, 480; City of San Antonio v. Besteiro, (Tex. Civ. App., 1919), 209 S. W., 472; Welch v. Harnett, 127 Misc. Rep., 221, 215 N. Y. S., 540; People v. Martin, supra; Packard v. Banton, supra; also note collecting cases, 22 A. L. R., 230.

The police power, in furtherance of public safety, health, and welfare, is coextensive with the public need, and the reasonableness of its exercise must be measured largely by the same standard. The daily toll of life, limb, and property exacted by the operation of automobiles generally upon the public streets and highways proclaims the public need for police regulation of all automobile operation. Because, perchance, the ordinance in question might well have regulated other classes of automobile users, or because, perchance, such regulation might more effectually have been accomplished by state legislation, does not militate against the power to regulate a proper and reasonable class of automobile users, nor against the power of a municipality, expressly conferred, to enter upon an unoccupied field within its own jurisdiction. Truax v. Corrigan, 20 Ariz., 7, 176 P., 570; Id., 257 U. S., 312, 42 S. Ct., 124, 66 L. Ed., [fol. 38] 254, 27 A. L. R., 375; People v. Martin, supra; Packard v. Banton, supra; Murphy v. City of Toledo, 108 Ohio St., 342, 140 N. E., 626.

The fact, if it be a fact, that the peculiar circumstances of the plaintiffs are such that because thereof they have not the ability to comply with the provisions of the ordinance as to bond, does not militate against the validity of the ordinance so long as they have the same opportunity to comply with the ordinance that other members of the class have and the ordinance has for its reasonable purpose the preservation of the public safety, health, and welfare. Auto Transit Co. v. City of Fort Worth, (Tex. Civ. App.), 182 S. W., 685; Puget Sound Traction, Light & Power Co. v. Grassmeyer, 102 Wash., 482, 173 P., 504, L. R. A., 1918F, 469, Hadfield v. Lundin, Pros. Atty., 98 Wash., 567, 168 P., 516, L. R. A., 1918B, 909, Ann. Cas., 1918C, 942.

The judgment of the Court of Appeals is affirmed.
Judgment affirmed.

Marshall, C. J., Matthias, Day, Allen and Kinkade, JJ., concur.
Jones, J., not participating.

[fol. 39] Reporter's certificate to foregoing paper omitted in printing.

[fols. 40-45] Clerk's certificates to transcript omitted in printing.

[fol. 46] SUPREME COURT OF OHIO

No. 22323

THE HODGE DRIVE-IT-YOURSELF COMPANY, THE BARRS SELF Driver Company, Inc.; Durken Drive-it-Yourself, Inc.; Brady Taxicab & Driverless Company, a Partnership, Consisting of John J. Brady, William A. Brady, and Philip H. Brady, Plaintiffs in Error,

vs.

THE CITY OF CINCINNATI, a Municipal Corporation; Russell Wilson, Mayor of said City; Clarence O. Sherrill, Manager of said City; Edgar Dow Gilman, Director of Public Utilities of said City; Stephen W. McGrath, Treasurer of said City, and William Copelan, Chief of the Police Department of said City, Defendants in Error

PETITION IN ERROR—Filed May 8, 1930

Plaintiffs in error say, that at the November, 1929, Term of the Court of Appeals of the first appellate district, Hamilton County, Ohio, defendants in error recovered a [fol. 47] judgment by the consideration of said court, against plaintiffs in error, in an action then pending therein, wherein plaintiffs in error were plaintiffs-appellees, and defendants in error were defendants-appellants, a transcript of the docket and journal entries whereof is filed herewith.

There is error in said record and proceedings, in this, to wit:

1. Said court erred in overruling the motion of plaintiffs in error for a new trial.

2. Said court erred in the admission of evidence of said defendants in error, to which plaintiffs in error objected.

3. Said court erred in ruling out evidence offered by said plaintiffs in error.

4. Said judgment was contrary to, and not sustained by the evidence.

5. Said judgment was given for defendants in error when it ought to have been given for plaintiffs in error.

6. Said court erred in holding that Ordinance No. 50-1929, of the ordinances of the city of Cincinnati, Ohio, and especially Sections 65-1b; 65-1e; 65-2; 65-3; 65-5; 65-7; 65-8; 65-9; 65-10; 65-11; 65-13; 65-42; 65-45; 65-47 and 65-48 were valid ordinances, and were constitutional, whereas, plaintiffs in error claim that said ordinance, and the particular sections thereof, as aforesaid, are invalid, unconstitutional and void, in that they are in violation of Section 1, Article 14 of the amendments to the Constitution of the United States; that they are in violation of Section 1 of Article 1; Section 16 of Article 1; Section 19 of Ar- [fol. 48] ticle 1; Section 1 of Article II; Section 26 of Article II, and Section 1 of Article IV of the Constitution of the state of Ohio, in that the city of Cincinnati, acting through its council, exceeded the powers given to it by the charter of the city of Cincinnati, and the statutes of the state of Ohio, and the constitutions of the United States and of the state of Ohio, in enacting said ordinance; that by the operation of said ordinance, there is a taking of the property of plaintiffs in error without due process of law; that there is a denial to plaintiffs in error of the equal protection of the laws; that there is an interference with the inalienable rights of plaintiff in error to acquire, possess and protect their property; that there is a denial to plaintiffs in error of a remedy by due course of law in the courts of this state; that there is a vesting of legislative and judicial authority in the administrative officers of the city of Cincin-

nati, and that there is a discrimination against plaintiffs in error in the operation of said law, and a denial to plaintiffs in error of the uniform operation of all laws of a general nature throughout the state.

Plaintiffs in error therefore pray that said judgment may be reversed, and that they be restored to all things they have lost by reason thereof.

Julius R. Samuels, Attorneys for Plaintiffs in Error.

Waiver of Summons

Summons in error is hereby waived, and appearance of defendants in error is hereby entered.

John D. Ellis, City Solicitor; Milton H. Schmidt, Assistant Solicitor of the City of Cincinnati, Attorneys for Defendants in Error.

[fol. 49] In Court of Common Pleas of Hamilton County, Ohio

[No. A-13005]

The Hodge Drive-It Yourself Company, The Barrs Self Driver Company, Inc.; Durkin Drive It Yourself, Inc.; Brady Taxicab & Driverless Company, a Partnership, Consisting of John Brady, William Brady, and Philip Brady, Plaintiffs,

vs.

The City of Cincinnati, a Municipal Corporation; Murray Seasongood, Mayor of said City; Clarence O. Sherill, Manager of said City; Edgar Dow Gilman, Director of Public Utilities of said City; Stephen W. McGrath, Treasurer of said City, and William Copelan, Chief of the Police Department of said City, Defendants

Transcript of Docket and Journal Entries

1929, March 5.—Petition filed.

1929, March 5.—Minute 2595. Temporary restraining order allowed; bond $1000.00.

1929, March 5.—Bond 211 in Book 25 in $1000.00 for injunction given.

[fol. 50] 1929, March 5.—Summons issued endorsed; injunction allowed; bond in $1000.00 given. Frank Lewis, clerk by E. P. Scollain, deputy.

1929, March 18.—Summons returned endorsed: Received by William M. Anderson, sheriff, Hamilton county, Ohio. March 5, 12:50 p. m., 1929. Served the within named defendants Murray Seasongood, mayor of the city of Cincinnati, Clarence O. Sherill, manager of the city of Cincinnati, Edgar Dow Gilman, direction of public utilities of city of Cincinnati, Stephen McGrath, treasurer of city of Cincinnati, William Copeland, chief of police of city of Cincinnati, by delivering to each personally, a true copy of this writ with all the endorsements thereon. Also served the city of Cincinnati, a municipal corporation, by delivering a true copy of this writ with all the endorsements thereon personally to John D. Ellis, solicitor thereof. Sheriff fees $2.16. William M. Anderson, sheriff, Hamilton county, Ohio. By Harry Tegeler.

1929, March 19.—Answer filed.

1929, March 22.—Minute 2661. Application for an official stenographer. Julius Samuels, attorney for plaintiff and Milton Schmidt, assistant city solicitor, attorney for defendants, request the service of an official stenographer to make a full report of the testimony and proceedings in this case. Signed Julius Samuels. Milton Schmidt, assistant city solicitor. The above request for an official stenographer is granted and Laura Simmons is appointed to make a full report of the testimony and proceedings.

1929, July 27.—Minute 2494. Decree making temporary injunction permanent; defendant excepts.

[fol. 51] This cause came on to be heard on the pleadings and the evidence, was submitted to the court, on consideration whereof, the court find on the issues joined, for the plaintiffs and that the plaintiffs are entitled to the relief prayed for.

The court further find that Ordinance No. 50-1929 of the ordinances of the city of Cincinnati and especially Section 65-1B; Section 65-1E; Section 65-2; Section 65-3;

Section 65-5; Section 65-7; Section 65-8; Section 65-9; Section 65-10; Section 65-11; Section 65-13; Section 65-42; Section 65-45; Section 65-47; and Section 65-48 thereof are invalid and inoperative as to the plaintiffs and that said defendants should be enjoined and restrained from enforcing or attempting to enforce said ordinance and the respective sections thereof as aforesaid as against the plaintiffs herein.

It is therefore ordered, adjudged and decreed, that the temporary restraining order heretofore granted in this action be, and the same is hereby made permanent, and the defendants the city of Cincinnati, a municipal corporation; Murray Seasongood, mayor of said city; Clarence O. Sherill, manager of said city; Edgar Dow Gilman, director of public utilities of said city; Stephen W. McGrath, treasurer of said city and William Copeland, chief of the police department of said city be, and they are hereby jointly and severally, perpetually enjoined and restrained from interfering with the operation of the business of said plaintiffs and with the operation of the automobiles owned by plaintiffs and operated by the persons to whom the automobiles [fol. 52] may be leased or rented; said defendants are also enjoined and restrained from instituting criminal proceedings against said plaintiffs or their agents, servants and employees or against the persons who may rent or lease their said automobiles, under the provisions of the aforesaid sections thereof.

It is further ordered that the said defendants pay the costs of this action, taxed at $—.

To all of the foregoing said defendants by their counsel, excepts and give notice of their intention to appeal to the Court of Appeals; bond for appeal is fixed at $200.00.

1929, August 8.—Notice of appeal given. Bond $200.00.

1929, August 20.—Min. 4273. Entry granting leave to withdraw exhibits and substitute photostatic copies.

1929, September 6.—Bill of exceptions filed.

1929, September 6.—Notice of filing of bill of exceptions issued to sheriff.

[Duly certified.]

IN COURT OF COMMON PLEAS OF HAMILTON COUNTY

PETITION—Filed March 5, 1929

Plaintiffs say that the city of Cincinnati is a municipal corporation organized and existing under and by virtue of the laws of the state of Ohio; that Murray Seasongood is the mayor of said city; Clarence O. Sherrill is the manager of said city; Edgar Dow Gilman is the director of public utilities of said city; Stephen W. McGrath is the treasurer of said city, and William Copelan is the chief of the police department of said city.

Plaintiffs further say that each and every one of them are [fol. 53] engaged in the business of renting or leasing automobiles to be driven by the renter, said business being commonly known as "driverless or drive-it-yourself automobile" business, under contracts entered into between said plaintiffs and the persons renting or leasing their automobiles.

The plaintiff, The Hodge Drive-It-Yourself Company, is a corporation organized and existing under and by virtue of the laws of the state of Ohio with its principal place of business in Cincinnati, and has been engaged in said business for three years last past, and is maintaining and renting out twenty-two (22) automobiles. The plaintiff, The Barrs Self Driver Company, Inc., is a corporation organized and existing under and by virtue of the laws of the state of Ohio with its principal place of business in Cincinnati, and has been engaged in said business for more than four years last past, and is maintaining and renting out twenty-six (26) automobiles. The plaintiff, Durken Drive-It-Yourself, Inc., is a corporation organized and existing under and by virtue of the laws of the state of Ohio with its principal place of business in Cincinnati, and has been engaged in said business for two months last past, and is maintaining and renting out twenty-one (21) automobiles. The plaintiff, Brady Taxicab & Driverless Company, is a partnership consisting of John J. Brady, William A. Brady and Philip S. Brady, doing business is the city of Cincinnati and has been engaged in said business for one year last past, and is maintaining and renting out five (5) automobiles.

The officers, directors and principal stockholders of plain- [fol. 54] tiff corporations have been engaged in said busi-

ness prior to the incorporation of their respective firms, for a number of years last past.

Plaintiffs say that each and every one of them has paid to the state of Ohio a license fee of four dollars ($4.00) for each automobile owned by them and used in their business, as required by the laws of the state of Ohio for the right to operate said automobiles.

Each of said plaintiffs has paid to the city of Cincinnati, the required license fee on each of their automobiles for the privilege of operating their said vehicles in the city of Cincinnati, the present license fee being eight dollars ($8.00) per year for each automobile owned by said plaintiffs and used in their business.

Plaintiffs further say that by virtue of an ordinance passed in December of 1928, entitled Ordinance No. — of the ordinances of the city of Cincinnati, temporary licenses to operate their said automobiles were issued to each of them, which expired on February 28, 1929, and that by virtue of Ordinance No. 89 of the ordinances of the city of Cincinnati, passed on February 20, 1929, and effective immediately, applications were made by each of said plaintiffs for licenses from March 1, 1929, to December 31, 1929, said applications having been approved by the director of public utilities and licenses are about to be issued to said plaintiffs under said applications.

Plaintiffs bring this action on behalf of themselves and all other persons, firms or corporations similarly situated and engaged in the same line of business.

Plaintiffs for their cause of action against defendants say [fol. 55] that on February 6, 1929, the council of the city of Cincinnati passed an ordinance regulating public vehicles and public vehicle drivers, said ordinance being known and numbered as Ordinance 50-1929, said ordinance being subdivided into Sections 65-1 to 65-a-28, and which ordinance becomes effective on March 9, 1929.

Said Ordinance No. 50-1929 of the ordinances of the city of Cincinnati provides among other things, as follows:

Sec. 65-1b. The term "public vehicles" shall apply to all vehicles furnishing individual service as a business in the transportation of persons, which are hereby classified as (1) public vehicles which seek their business, or a part thereof, on the public streets or quasi-public places, to wit: "taxicabs," and (2) public vehicles which use the public

streets for the purpose of transporting passengers for hire, but which do not seek their business thereon, or in quasi-public places, to wit: "autosforhire," "driverless autosforhire" and "funeral cars."

Sec. 65-1e. The term "driverless autosforhire" shall include any public vehicle which is rented or hired out to a person other than the owner, and operated by the person renting or hiring the same for his own use and not for the purpose of transporting persons for compensation.

Sec. 65-2. Vehicle License Fees.—No public vehicle shall be operated unless a license has been issues to the owner thereof, and is in force. Every license shall expire on the thirty-first day of December of the year for which it is issued. In the case of licenses issued for operation on or [fol. 56] after July 1 of any year, the fee shall be one-half the per annum fee.

License fees for each public vehicle shall be payable to the city treasurer in the following amounts per annum:

Taxicabs	$24.00
Autosforhire	18.00
Funeral car	12.00
Driverless autoforhire	8.00

The license fee as indicated by this section shall be in addition to the fee required under the laws of the state of Ohio on all motor vehicles.

Sec. 65-3. Application for Vehicle License.—Applications for licenses for public vehicles shall be made to the director upon blanks provided by the director, and shall set forth the name and address of the applicant, the trade name under which he does business, the class of vehicle for which the license is desired, the seating capacity, the design, color scheme and lettering and marks to be used on said vehicle, and any other information required by the director. If the application is granted, the applicant shall furnish the director, prior to the issuance of the license tag, with information covering the particular vehicle to be licensed, such information to include the make, the state license number, the length of time the vehicle has been in use, the motor power thereof, and the name and address of the person, firm, or corporation from which the vehicle

was purchased, and any other information required by the director.

Sec. 65-5. Issuance of Funeral Car and Driverless Auto-[fol. 57] forhire Licenses.—The director shall investigate each application for license for a funeral car or driverless autoforhire, and if he finds that the applicant is the owner of the public vehicle for which the license is desired, and that such public vehicle is a safe and fit conveyance, he shall notify the city treasurer, who shall issue a license to the applicant upon payment of the proper license fee and the furnishing of the bond or insurance required.

Sec. 65-7. Liability Insurance Required.—No license to operate any public vehicle shall be issued or renewed by the city treasurer, and it shall be unlawful to operate any such public vehicle, or permit such to be operated, unless and until the applicant shall deposit with the city treasurer a policy or policies of liability insurance issued by a responsible insurance company, approved as to sufficiency by the city treasurer, and as to legality by the city solicitor, providing indemnity for or protection to the insured against loss in the amounts provided for in Sections 65-8, 65-9 and 65-10, and agreeing to pay within the limits of the amounts fixed in said sections to any judgment creditor who shall have filed his suit or filed notice of a claim for such loss with the city treasurer during the license year in which the injury occurred or six months thereafter any final judgment rendered against the insured by reason of the liability of the insured to pay damages to others for bodily injuries, including death, at any time resulting therefrom, and for damages to or destruction of property sustained during the term of said policy by any person other than employees of the insured, and resulting from negligent operation, maintenance or use of such licensed public vehicles.

[fol. 58] The policy of insurance aforesaid and the bond given in lieu thereof, as hereinafter referred to, shall provide that in case the vehicle is operated, maintained or used with the consent or acquiescence of the owner, by one other than the owner, his agent, or employee, and an injury results to person or property as indicated above, due to the negligent operation, maintenance or use of said vehicle,

that the insurer or the obligors in the bond, as the case may be, shall pay to any judgment creditor of said person so maintaining, using or operating said vehicle any final judgment rendered against said person so maintaining, using or operating said vehicle, provided that said judgment creditor shall have filed his suit, or filed notice of claim for such loss in all respects as is provided for the judgment creditor of the insured in the foregoing paragraph.

The policy or policies of insurance, and the sureties hereinbefore required, shall be valid and effective for no less a period than that for which the license is issued.

Sec. 65-8. Extent of Liability.—The extent of the liability of the insurer shall be, as to any one licensed public vehicle, the sum of five thousand dollars ($5,000.00) on account of injuries to, or death of, any one person in any one accident; and subject to such limit as respects injury to, or death of, one person, ten thousand dollars ($10,000.00) on account of any one accident resulting in injury to or death of more than one person; and one thousand dollars ($1,000.00) on account of damage to property in any one accident.

Sec. 65-9. Limitation of Liability for Property Damage.—[fol. 59] In the case of property damage the insurer shall have the option of limiting his total liability as follows:

For not more than two public vehicles	$2,000.00
For each vehicle in excess of two, not in excess of five	1,000.00
For each vehicle in excess of five, not in excess of ten	750.00
For each vehicle in excess of ten, not in excess of twenty-five	500.00
For each vehicle in excess of twenty-five, not in excess of fifty	300.00
For each vehicle in excess of fifty	200.00

Sec. 65-10. Additional Insurance.—Any insurer limiting his total liability as to property damage in accordance herewith shall notify the city treasurer forthwith of any insurance payments made on behalf of applicant which would operate to reduce the outstanding total limited liability. The city treasurer shall thereupon require adequate additional insurance and in the event of the failure of applicant

to furnish the same on ten days' notice, his license or licenses shall be suspended until the required additional insurance is provided. Failure of the insurer to notify the city treasurer shall operate to maintain the total liability of the insurer without allowance for payments made.

Sec. 65-11. Bond in Lieu of Insurance.—In lieu of the policy or policies of insurance herein provided for applicant may furnish a bond executed by a surety company, authorized to do business in the state of Ohio, or by two personal sureties, approved as to sufficiency by the city [fol. 60] treasurer and as to legality by the city solicitor, holding and binding the principal and sureties to the same liability, and subject to the same conditions as in the case of policies of insurance provided for hereunder. It shall further be permissible for the applicant to furnish insurance as to damages for personal injuries, including death, and an indemnity bond as to property damages, or vice versa.

Sec. 65-13. Metal Tag.—At the time the license is issued by the city treasurer to the owner of any public vehicle, the city treasurer shall also issue to such owner a metal tag showing the class of public vehicle, the license number and the year for which issued. The tags for each class of public vehicle shall be numbered consecutively each year, except that tags for taxicabs shall be numbered to correspond to the body number assigned by the director. No tag shall be displayed on any public vehicle except the one for which it was issued. The tag shall be affixed to the front of the vehicle so as to be plainly discernible at all times.

Sec. 65-42. Director's Powers.—The director is authorized and empowered to establish and adopt such rules and regulations governing the issuance of public vehicle licenses and the inspection of public vehicles and their appurtenances as are reasonable and necessary, and not inconsistent with the terms of this division.

Sec. 65-45. Operation Without License; Penalty.—Any person, firm, or corporation operating or permitting to be operated for hire, an unlicensed vehicle, shall be fined not more than two hundred dollars ($200.00) or imprisoned [fol. 61] for not more than thirty (30) days, or both; and in the event of conviction, such person, firm, or corporation

shall not thereafter be granted a license for the vehicle concerned for a period of three months for a first conviction and one year for a subsequent conviction.

Sec. 65-47. Violation Penalties.—Any person, firm, or corporation, or any owner, agent, employee, or driver of a public vehicle who violates any of the provisions of this division, for which no other fine and/or imprisonment is specified, shall be fined not less than five dollars ($5.00) nor more than one hundred dollars ($100.00).

For the habitual violation of the provisions of this division, the city treasurer, upon recommendation of the director, shall revoke the license for the vehicle involved.

Sec. 65-48. Appeals.—Whenever the director shall have refused to authorize a public vehicle license, or whenever the city treasurer has suspended or revoked a public vehicle license, the applicant, within ten (10) days after receiving notice of such denial, suspension, or revocation, may appeal to the city manager. The city manager may either consider said appeal on the evidence produced before the director, or permit the introduction of new evidence, inspections, and tests. The decision of the city manager shall be final.

Provided, however, that when the director's refusal of a license shall be upon the grounds of public necessity and convenience, then the applicant, within ten days after receiving notice of such refusal, may appeal to the city council. The council may either consider said appeal on the evidence produced before the director, or permit the intro- [fol. 62] duction of new evidence, inspections, and tests. The decision of the city council shall be final.

Plaintiffs further say that unless the provisions of Secs. 65-7, 65-8, 65-9, 65-10 and 65-11 are complied with by plaintiffs by March 9, 1929, the effective date of said ordinance, (unless the defendants are restrained from enforcing said ordinance), said plaintiffs will be subject to arrest and to a penalty including heavy fines and imprisonment under Sec. 65-45 of said ordinance, and the licenses about to be issued to them for the right to operate their said vehicles in the city of Cincinnati, will be subject to revocation under Sec. 65-47 of said ordinance.

Plaintiffs further say that it is impossible for them and others similarly situated and engaged in the same line of

business, to comply with Secs. 65-7, 65-8, 65-9, 65-10 and 65-11, for the reason that no reputable insurance company in good standing will issue insurance policies for liability and property damage under the terms provided by said ordinance, acceptable to the treasurer of the city of Cincinnati, and that any companies that might write such insurance would not be acceptable to the treasurer of the city of Cincinnati who, under said ordinance, must approve the same. That even if said insurance could be obtained, the premiums for same would be so prohibitive as to result in a complete ruination of plaintiffs' business with the resulting loss to them of the value of their property and the good will established in their business.

Plaintiffs further say that as to the bond required in lieu of said insurance policies, by Sec. 65-11 of said ordinance, neither any reputable surety companies nor private sureties [fol. 63] will underwrite said bonds unless they are amply secured by plaintiffs which plaintiffs will be unable to comply with because of the large amount involved and further that the premiums on said bonds would be so prohibitive as to result in a complete ruination of plaintiffs' business with the resulting loss to them of their property and the good will established in their business.

That the provision for insurance as set forth in the first and second paragraphs of Sec. 65-7 of said ordinance, or the bond in lieu thereof as provided under Sec. 65-11 of said ordinance, to protect owners of such vehicles against loss by reason of judgments that might be obtained against them by persons injured as the result of the negligence of the drivers of plaintiffs' automobiles, and/or to provide for payment to persons injured through the negligence of the operators of such automibles, for judgments that may be obtained by such injured persons against the persons operating said automobiles, is impracticable and a vain thing as there is no legal liability fixed or created by any statute of the state of Ohio or by the common law of the state of Ohio, creating liability against an owner of an automobile, without any negligence or fault on his part or where no agency exists between the owner of said automobile and the person operating the same, or any liability against one person for the payment of a judgment obtained against another person, between whom there is no privity.

Plaintiffs further say that there is no legal liability cast upon them by any statute of the state of Ohio or the com-
[fol. 64] mon law of the state of Ohio by reason of the operation of their said automobiles by persons to whom they rent or lease same, except on account of any negligence on their own part and that they are financially responsible and fully able to respond to any reasonable judgments that might be rendered against them by any court of competent jurisdiction for damages resulting from the operation of their business, for which they may be legally liable and that therefore the public is fully and amply protected in that regard.

Plaintiffs further say that they are of good character, that they conduct their business with reasonable prudence, that their automobiles are not put to the same public uses as are taxicabs, autos for hire, street cars, motor busses or other public vehicles, and that they exercise due care and prudence in selecting the persons to whom they rent or lease their automobiles, demanding in all cases references as to the character and fitness of such persons and making careful investigations before renting or leasing their said automobiles.

Plaintiffs further say that no public good will be accomplished by the enforcement of said ordinance and the sections thereof as aforesaid, but that on the contrary the enforcement thereof will result in the complete destruction of their business, resulting in the loss to them of their property and the good will created in connection with the operation thereof as a result of their honest and fair dealings, to their irreparable damage and injury for which they have no adequate remedy at law, and will also be a detriment to that part of the general public who rent or lease such vehicles.

[fol. 65] Plaintiffs further say that unless said defendants and each of them are restrained by an order of this court from enforcing said ordinance and the sections of said ordinance as aforesaid, the defendant, Edgar Dow Gilman, director of public utilities, will recommend to the defendant, Stephen W. McGrath, city treasurer, and the city treasurer will, upon said recommendation, revoke the licenses issued to said plaintiffs for the vehicles owned by them, which said defendants have threatened to do. That the defendant, William Copelan, chief of the police department of the city

of Cincinnati, will cause said plaintiffs to be arrested and to be held for trial before the municipal court of Cincinnati, where they will be subject to heavy fines and imprisonment for the violation of said ordinance and the respective provisions thereof as aforesaid, and that by reason of those acts, plaintiffs' business will be greatly interfered with, their organization disrupted, their equipment depreciated and their business will become completely ruined with the resulting loss to them of their invested capital and the good will in connection with said business, which is of great value, will be lost to said plaintiffs, all to their irreparable loss and damage for which they have no adequate remedy at law and therefore resort to a court of equity for relief.

Plaintiffs further say that said ordinance and especially Secs. 65-1b, 65-2, 65-3, 65-5, 65-7, 65-8, 65-9, 65-10, 65-11, 65-13, 65-42, 65-45, 65-47 and 65-48, are unconstitutional, invalid and void, for the following reasons:

First. The city of Cincinnati acting through its council, in enacting said ordinance, has exceeded the powers given [fol. 66] to it by the charter of the city of Cincinnati and the statutes of the state of Ohio in such cases made and provided.

Second. Said ordinance and the respective sections thereof aforesaid, are in violation of the Constitution of the United States and especially Section 1, Article 14, of the amendments to the Constitution of the United States.

Said ordinance and the respective sections thereof aforesaid, are in violation of the Constitution of the state of Ohio and especially Section 1 of Article 1, Section 16 of Article 1, Section 19 of Article 1, Section 1 of Article 2, Section 26 of Article 2, and Section 1 of Article 4, thereof, in that there is a taking of the property of plaintiffs, without due process of law; there is a denial to plaintiffs of the equal protection of the laws; there is an interference with the inalienable rights of plaintiffs to acquire, possess and protect their property; there is a denial to plaintiffs of a remedy by due course of law in the courts of this state; there is a vesting of legislative and judicial authority in administrative officers of the city of Cincinnati, there is a discrimination against plaintiffs in the operation of said law and denial to plaintiffs of the uniform operation of all laws of a general nature throughout the state.

Wherefore plaintiffs and each of them pray that said defendants and each of them, be restrained from enforcing or attempting to enforce said Ordinance No. 50 and the respective sections of said ordinance as aforesaid, and especially that they be restrained from insisting upon and demanding of plaintiffs the delivery of the insurance policies [fol. 67] or the bonds in lieu thereof as provided in said ordinance; that they be restrained from interfering with the operation of plaintiffs' business and be restrained from the interference with the operation of the automobiles owned by plaintiffs and operated by the persons to whom such automobiles may be leased or rented; that said defendants may be restrained from revoking or attempting to revoke, plaintiffs' licenses or from instituting criminal proceedings against said plaintiffs or any one of them, or their agents, servants and employees or against the persons who may rent or lease their said automobiles; that pending the final hearing of this cause, a temporary restraining order be issued enjoining and restraining said defendants and each and every one of them, from doing the acts aforesaid; that no final hearing the court find said ordinance and the rsepective sections thereof as aforesaid, to be invalid and void and that said restraining order be made permanent; for their costs herein expended and for all other legal and equitable relief to which plaintiffs may be entitled to in the premises.

Julius R. Samuels, Attorney for Plaintiffs.

[Duly verified.]

To the Clerk:

Let a temporary restraining order issue as prayed for in the petition. Bond is fixed at $1000.

Stanley Struble, Judge of the Court of Common Pleas, Hamilton County, Ohio.

[fol. 68] In Court of Common Pleas of Hamilton County

Answer—Filed March 19, 1929

1. The defendants, for answer to plaintiffs' petition, admit that the city of Cincinnati is a municipal corporation under the laws of the state of Ohio; that the defendant,

Murray Seasongood, is the mayor of the city of Cincinnati; that the defendant, Clarence O. Sherrill, is the city manager of said city; that the defendant, Edgar Dow Gilman, is director of public utilities of said city; that the defendant, Stephen W. McGrath, is the treasurer of said city; and that the defendant, William Copelan, is the chief of the police department of said city.

2. The defendants admit that each one of the plaintiffs is engaged in the business of renting or leasing automobiles to be used and operated by the renter for purposes of transportation, which business is commonly known as the "Driverless or Drive-It-Yourself Automobile" business.

3. For lack of knowledge the defendants deny the allegations of the petition relative to the corporate and partnership existence of the various plaintiffs, the number of automobiles owned and operated by the various plaintiffs, the period for which plaintiffs have been in business, the payment by each of plaintiffs to the state of Ohio of a fee of $4.00 for each automobile owned by them and used in their business, and the policy followed by plaintiff of requiring references and making careful investigations before furnishing automobiles to their customers.

4. The defendants admit that each of the plaintiffs paid [fol. 69] to the city of Cincinnati in the year 1928 a license fee of $8.00 per year for the privilege of operating their said vehicles in the city of Cincinnati, but the defendants say that all of said licenses expired on December 31, 1928, and were temporarily extended as hereafter set forth.

5. The defendants admit that pursuant to Ordinance No. 761-1928, passed December 26, 1928, which ordinance provided for the temporary extension of 1928 licenses until March 1, 1929, pending the enactment of a permanent licensing ordinance, the licenses which had been issued to each of the plaintiffs in the year 1928 were extended until March 1, 1929, under the terms and conditions and upon the payment of the fees set forth in said ordinance. A copy of said Ordinance No. 761-1928 marked Exhibit "A" is herewith attached and made a part hereof.

6. The defendants admit that Ordinance No. 89-1929, passed by the council of the city of Cincinnati on February 20, 1929, provided for the issuance of licenses for public

vehicles from March 1, 1929, but said ordinance was an emergency ordinance to provide for the control of public vehicles from March 1 to March 8 when Ordinance No. 50-1929 was to become effective. A copy of said Ordinance No. 89-1929, marked Exhibit "B," is attached hereto and made a part hereof.

7. The defendants admit that on February 6, 1929, the council of the city of Cincinnati passed Ordinance No. 50-1929 providing for the regulation of public vehicles and public vehicle drivers, and it is admitted that the provisions of said ordinance set forth in the petition are correctly stated. A copy of said Ordinance No. 50-1929, marked Ex-[fol. 70] hibit "C," is attached hereto and made a part hereof.

8. The defendants admit that said ordinance became effective March 9, 1929, and that it provides certain penalties for those who fail to comply with the provisions thereof.

9. The defendants admit that plaintiffs have filed applications with the director of public utilities of the city of Cincinnati for licenses to operate their vehicles, but defendants deny that said licenses have been approved by said director. Plaintiffs have failed to comply with the provisions of the ordinances requiring them to deposit policies of insurance or bonds with the city of Cincinnati and therefore the applications of plaintiffs have been rejected.

10. The defendants deny that it is impossible for the plaintiff and others engaged in the same line of business to comply with Sections 65-7, 65-8, 65-9, 65-10 and 65-11 of said ordinance, which sections require the deposit of liability insurance, or bonds in lieu of insurance, as a condition precedent to the granting of licenses to operate for public vehicles covered by said ordinance. The defendants deny that reputable insurance companies, acceptable to the treasurer of the city of Cincinnati, will not write insurance policies as required by said ordinance, and they deny that the premiums for such policies are prohibitive.

11. The defendants deny that the provisions of said ordinance specified in the petition or any of them are unconstitutional and void.

[fol. 71] 12. The defendants deny each and every other allegation contained in the petition except such allegations as are herein specifically admitted to be true.

Wherefore, having fully answered the defendants pray that the temporary injunction heretofore issued herein be dissolved and that the plaintiffs' petition be dismissed, that judgment be entered for the defendants, and for such further relief as may be proper.

John D. Ellis, City Solicitor. Milton H. Schmidt, Assistant Solicitor.

[Duly verified.]

(Exhibit A, Ordinance No. 761-1928, Exhibit B, Ordinance No. 89-1929, and Exhibit C, Ordinance No. 50-1929, referred to in the above answer, are omitted therefrom for the reason that they are a part of the bill of exceptions and are reproduced as a part of said bill of exceptions.)

[fol. 72] In Court of Appeals of Hamilton County, Ohio

[No. 3602]

Hodge Drive-It-Yourself Company, The Self Driver Company, Inc.; Durken Drive-It-Yourself, Inc.; Brady Taxicab & Driverless Company, a Partnership, Consisting of John J. Brady, William A. Brady, and Philip H. Brady, Plaintiff-Appellees,

vs.

The City of Cincinnati, a Municipal Corporation; Murray Seasongood, Mayor of said City; Clarence O. Sherrill, Manager of said City; Edgar Dow Gilman, Director of Public Utilities of said City; Stephen W. McGrath, Treasurer of said City, and William Copelan, Chief of Police Department of said City, Defendant-Appellants

Transcript of Docket and Journal Entries

1929, September 11.—Transcript and original papers filed.

1930, February 27.—Minute 52. Entry substituting defendant.

[fol. 73] It appearing to the court that since this proceeding was first commenced in the Common Pleas Court of Hamilton county, Ohio, Russell Wilson was elected mayor of the city of Cincinanti, in place of Murray Seasongood, and plaintiffs having made application to the court to substitute the said Russell Wilson, as mayor of the city of Cincinnati, in place of Murray Seasongood;

It is therefore ordered and adjudged, that Russell Wilson be and he is hereby substituted as a party defendant, as mayor of the city of Cincinnati, in place of Murray Seasongood, as mayor of the city of Cincinnati, in this cause.

1930, April 5.—Minute 75. Final decree finding for defendants, dismissing petition; plaintiff to pay all costs.

This cause came on for hearing on the pleadings, the evidence and the arguments of counsel and was submitted to the court.

On consideration thereof the court finds on the issues joined in favor of the defendants.

The court further finds that the ordinances of the city of Cincinnati set forth in plaintiffs' petition are valid and constitutional.

It is therefore ordered, adjudged and decreed that the plaintiffs' petition be dismissed and that the plaintiffs shall pay all costs of this appeal and all costs in the Court of Common Pleas, to which plaintiff excepts.

It is further ordered that the enforcement of the ordinance involved in this action be, and is hereby, stayed for a period of thirty days from date hereof, pending the prosecution of proceedings in error in the Supreme Court of Ohio.

[fol. 74] 1930, April 5.—Motion to set aside judgment and for a new trial filed.

1930, April 5.—Minute 75. Entry overruling motion for a new trial.

This matter came on to be heard on the motion of plaintiffs to set aside judgment heretofore entered herein and for a new trial, was submitted to the court, on consideration whereof the court finds that said motion is not well taken and does hereby overrule the same; to all of which plaintiffs except.

1930, April 14.—Bill of exceptions filed.

1930, April 14.—Notice of filing of bill of exceptions issued to sheriff.

1930, April 21.—Notice of filing of bill of exceptions returned endorsed: Received by William M. Anderson, sheriff, Hamilton county, Ohio, April 14, 3:45 p. m., 1930:

Cincinnati, April 15, 1930.—Served the within named John D. Ellis, attorney of record, by delivering to him personally a true copy of this writ with all the endorsements thereon. Sheriff's fees 91¢. William M. Anderson, sheriff, Hamilton county, Ohio. By Edwin J. Siegler, deputy.

1930, April 26.—Bill of exceptions transmitted to Judges Cushing, Hamilton and Ross.

1930, May 3.—Bill of exceptions received from Judges Cushing, Hamilton and Ross.

[Duly certified.]

[fol. 75] In Court of Appeals of Hamilton County

Motion to Set Aside Judgment and for a New Trial—Filed April 5, 1930

Come now the plaintiffs, by their attorney, and move the court to set aside the judgment heretofore entered herein, and for a new trial, for the following reasons, to wit:

1. The judgment is not sustained by, and is contrary to, the evidence.

2. The judgment is contrary to law.

3. The court erred in admitting evidence offered by the defendants over the objection of plaintiffs.

4. The court erred in refusing to admit evidence offered by plaintiffs.

5. The judgment should have been for the plaintiffs instead of for the defendants.

6. Other errors apparent of record.

Julius R. Samuels, Attorney for Plaintiffs.

[fol. 76] In Court of Appeals of Hamilton County

Bill of Exceptions—Filed April 14, 1930

Caption

Be it remembered, that upon the trial of this cause at the November Term of the Court of Appeals of First Appellate

District, Hamilton county, Ohio, 1929, before the Honorable Wade Cushing, Honorable Francis M. Hamilton and Honorable Simon Ross, judges of the Court of Appeals of the First Appellate District, Hamilton county, Ohio, the following proceedings were had, to wit:

Wednesday, February 26, 1930—10:00 A. M.

OFFERS IN EVIDENCE

And thereupon the plaintiffs to maintain the issues upon their part offered the following evidence, to wit:

By Mr. Samuels: I want to offer in evidence a certified copy of Ordinance No. 50-1929, the ordinance in question in this case.

The court having permitted the ordinance so offered to be marked as an exhibit said Ordinance 50-1929 was thereupon marked Exhibit 1, is hereto attached and made part hereof.

By Mr. Samuels: I also offer in evidence a certified copy of Ordinance No. 89-1929.

By permission of the court, said Ordinance No. 89-1929 was thereupon marked Exhibit 2, is hereto attached and made part hereof.

By Mr. Samuels: I also now offer in evidence a certified copy of Ordinance 761-1928.

By permission of the court said Ordinance No. 761-1928 was thereupon marked Exhibit 3, is hereto attached and made part hereof.

[fol. 77] FRANK CURRY, called on behalf of plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Samuels:

Q. What is your name?
A. Frank Curry.

Q. Please give your residence, Mr. Curry.
A. 6289 Kinkaid road.
Q. Cincinnati?
A. Pleasant Ridge, Cincinnati.
Q. What is your business or occupation?
A. Insurance.
Q. With what firm are you associated?
A. Walter P. Dolle & Company.
Q. Where is their office?
A. 508 Dixie terminal.
Q. What connection with that company have you?
A. In charge of the casualty department.
Q. When you speak of casualty department you mean insurance on automobiles?
A. Automobiles and liability and property damage, and other forms of casualty insurance.
Q. And what insurance company does the Walter P. Dolle & Company represent?
A. In the casualty?
Q. Yes.
A. Globe Indemnity Company of Newark, New Jersey.
Q. Any others?
A. That is all.
Q. Do you know any of the parties to this action, The Hodge Drive-It-Yourself Company?
A. Yes, sir.
Q. Mr. Hodge?
A. Yes, sir.
Q. I wish to ask if Mr. Hodge made any inquiry of you as to liability insurance on automobiles which are leased [fol. 78] out or hired out under a contract commonly known as drive-it-yourself or driverless automobiles?
A. He has.
Q. And state whether or not the Globe Indemnity Company writes such insurance?
A. The Globe Indemnity Company writes insurance covering the legal liability of the owner only.
Q. That is to say the Globe Indemnity Company will insure the owner of the automobile as against any claims that might be asserted successfully or where there is a legal liability against the owner of the automobile?
A. Yes.

Q. But they will not insure the legal liability of any one else?

A. They will not insure the legal liability of the operator of the car.

Q. And is any distinction made as to who the owner of the automobile in question might be, that is any distinction made as to various financial responsibilities of the various companies?

A. Please state that another way.

Q. In writing insurance for the owner of an automobile what if anything has the financial responsibility of the owner to do with the determination of the company as to whether they will write it or not, if any?

A. The financial responsibility of the operator is not considered in the writing of the insurance covering the legal liability of the operator.

Q. I am speaking of the owner.

A. I am speaking of the owner as the owner of the business, and not the operator.

Q. So the company might insure the owner and not the operator?

A. That is right.

[fol. 79] Q. Is this form of insurance classified in any classification?

A. Yes.

Q. What is the classification?

A. The classification in casual manuals refers to them as driverless cars, there is a rate to insure the legal liability of the owner, and another rate insuring the legal liability of the owner and the rentee.

Q. You say your company does not write insurance to cover a rentee?

A. The rates are published in the manuals for all classes of risks.

Q. Will you give me the general basic rate for such insurance?

A. The basic rates for insuring the owner and the rentee is the private livery classification.

Mr. Schmidt: What is that, I did not catch that?

A. I say the rates for the legal liability of the owner of the car and the rentee is the private livery classification, that is the classification carried on the cheapest rate for the

public carrier vehicles plus 50 per cent. which makes the combined rates of 155 plus 50, which I think figures out 237.50.

The Court: Per car annually?

A. Per car annually, $237.50.

Q. $232.50, is it?

A. $232.50.

Q. Per car?

A. Per car.

Q. And it is immaterial how many cars there are, whether one or fifty, it is so much per car?

A. It makes no difference.

Q. There is no reduced rate?

A. No reduced rate, and there is another method of writing the business.

Q. What is that?

A. That is on the earnings basis.

[fol. 80] Q. And what is that rate?

A. Those rates I am unable to give you for the reason that in making those rates the basic rates for all classes of automobile liability insurance is the manual, per car, regardless of class, and the earnings must equal, that is figured on the basis of the basic rate must equal the basic rate to arrive at your rate regardless of the amount of earnings,—$232.50, to get to the earnings basis rate the company would take and divide that in dollars and cents and would arrive at the percentage of the earnings to produce $232.50.

Q. In other words if one automobile earned, let us say $2325 and you were insuring on the basis of earnings it would be 10 per cent. or $232.50, is that correct?

A. That is correct.

Q. And if the earnings were greater or less it will always work around that basis?

A. It may not on the first policy year but when the policy was completed on the earnings if the earnings did not produce premiums equal to $232.50 the rate would be changed the following year so that it would produce $232.50 per car.

Q. So that whichever method is used it would resolve itself basically to $232.50 a car?

A. Yes.

The Court: Just a different method of transacting the business.

A. The first year they may save money on writing on the earning basis and the next year the insurance company would penalize them by increasing the rate on the earning basis.

Q. When Mr. Hodge made inquiry of you as to such insurance I understand you advised him your company would not write it?

A. Yes.

[fol. 81] Q. State whether you made any other inquiries of any other insurance companies.

A. I did.

Q. Of whom?

A. United States Fidelity and Guaranty Company, the Travelers Insurance Company.

Q. Anybody else?

A. That is all.

Q. And what was the result of your inquiry in that regard?

A. That they would not write it.

Q. The Globe Indemnity Company, and the United States Fidelity and Guaranty Company, and the Travelers Insurance Company, what type of insurance companies are they in speaking of responsibility?

Mr. Schmidt: I object.

(Objection overruled by the court, and exception taken by Mr. Schmidt, counsel for defendants.)

A. The Travelers Insurance Company is the largest insurance company in the world writing this class of insurance; the United States Fidelity and Guaranty is the third largest company, and the Globe Indemnity is the fifth largest.

Q. When you say that what do you mean?

A. Largest in class and financial resources.

Q. Your company of course writes insurance for individuals, do you not, if I wanted to write my automobile insurance as an individual?

A. As an individual, if our investigation discloses you were a good moral risk we would.

Q. Aside from the fact that I was a proper person to do business with you would insure me?

A. Yes.

Q. Do you know the percentage in the city of Cincinnati of automobile owners who have casualty insurance as to [fol. 82] public liability, which I understand to be indemnification for a person who might be killed or injured, and property damage which I understand is indemnification for injury to other person's property, whether he has the means of knowing, yes or no?

Mr. Schmidt: I object.

(Objection overruled by the court and exception taken by Mr. Schmidt.)

Q. The question is, do you know or have the means of knowing?

A. The approximate——

Q. The question is, yes or no.

A. I can not answer yes or no, but I can say approximately.

Q. I will ask you to state the approximate percentage of such insurance both as to public liability and public damage.

Mr. Schmidt: I object.

The Court: Does that question relate to individual owners?

Mr. Samuels: Yes, I maintain that there is a discrimination here, and if it is a matter of public safety, the public generally ought to be covered.

(Objection overruled by the court, and exception taken by Mr. Schmidt.)

Q. What is the approximate percentage?

A. I would say between 24 and 26.

Q. As to what?

A. As to the number of automobiles registered in Hamilton county.

Q. What type of insurance?

A. Answering the question asked, personal injury and property damage.

Q. Between what?

A. 24 and 26 per cent.

[fol. 83] Q. And the balance of the individual owners are not insured, that is 74 or 76 per cent. is not insured?

A. This information is insurance statistics, what we can gather.

Q. I understand, from statistics made up by the various companies showing Cincinnati as a unit?

A. Yes.

Q. So the balance of the cars are not insured?

A. That is right.

Q. Can you state whether the Globe Indemnity Company will not issue insurance as required by Ordinance 50-1929 of the city of Cincinnati?

A. I can not answer the question until I know what the ordinance refers to.

Q. The ordinance requires insurance by the owners of automobiles to indemnify persons who might have judgments against them as well as persons who might have judgments against the rentee or person who rents or leases this automobile, that is if the person renting this automobile might injure another person or kill them, or another's property, the insurance under this policy is to indemnify any person who might obtain judgment against the rentee?

A. Your question is whether the Globe Indemnity refuses to write such insurance?

Q. Yes, and can you state the reasbn why?

A. Because of the unfavorable experience on such class of risk.

Q. When you say unfavorable experience, what do you mean?

A. Unfavorable loss experience.

Q. Is the risk great or small, or is there danger of fictitious claims; or what may be the reason.

A. I would say from experience it is the greatest menace on the streets of any city.

[fol. 84] Q. What is the greatest menace?

A. Driverless cars.

Q. In what way?

A. In that the insurance company insuring this class of risk are unable to get reports of accidents in most cases from the rentee, when accidents occur they do not report them to the driverless company, and the next thing we hear from them is from some attorney representing some injured party, or some property has been damaged.

Q. You do not mean it is the greatest menace—what do you mean so far as the insurance company is concerned?

A. I will change that statement and say that it is the greatest risk.

Q. To the insurance company?

A. To the insurance company.

Q. Not to the public, however?

A. I would say that the greatest risk to the public would be the greatest risk to the insurance company because they are insuring the public.

Q. Do you know of any large financially responsible insurance company that would insure such automobiles?

A. You mean among the largest companies?

Q. Among what I think are known as conference companies?

A. There are a number of large companies that are not members of the casualty and surety underwriters conference, but I know of no company in the conference or out of the conference with the possible exception of one, who would be considered a company of fair standing as to size and resources that would write them, or has written them.

Mr. Schmidt: I move that answer be stricken out.

[fol. 85] (Motion overruled by the court, and exception taken by Mr. Schmidt.)

Q. Which is that one that you know of?

A. General Casualty & Surety Company of Detroit, Michigan.

Q. How long have they written this kind of insurance?

A. I could not say.

Q. So far as you know there is no city in the United States that requires such insurance?

(Objection by Mr. Schmidt; objection sustained by the court.)

Mr. Samuels: I just want to find out if any had written them and how they arrived at the basis of risk, of his own knowledge, if he knows, I want to know if any insurance company has ever written them.

The Court: You asked if any city of the United States had attempted to regulate the matter in this way.

Q. In arriving at the determination of the insurable risk what does the insurance company take into consideration?

A. The insurance at its inception, the classification of the risk is merely a gamble until you have had an experience over we would say a wide spread of territory; the insurance companies writing this class of business have had such an experience and their experience has been so disastrous.

Q. What I am asking is how do you arrive at the classification of the risk?

A. I may explain that——

Q. I do not care what the risk is, but how do you arrive at the risk?

A. How do we determine the classification of the risk, by experience.

[fol. 86] Q. Over a number of years?

A. Over a number of years.

Q. You say that only one insurance company of any consequence has ever written this kind of insurance?

A. You misunderstood my statement.

Q. What did you say?

A. I said the only company I knew of that was writing this insurance at this time, or had any insurance in force, but a great number of the larger companies that are members of the national bureau have written this class of business.

Q. And they have abandoned it?

A. And they decline to write it because of bad experience.

Q. Now when a rate is fixed, Mr. Curry, for a type of insurance, in what way may that rate vary? In other words, does the experience of a year or more affect the rate in any year?

A. After a period of two years, yes.

Q. In what way?

A. If the experience is good the rate is lower, if the experience is bad the rate is increased.

Cross-examination.

By Mr. Schmidt:

Q. Mr. Curry, the only reason that your company refuses to write this type of insurance is because the risk is too great?

A. We consider it so.

Q. And that is because your experience has been that there are a great many accidents in your experience with the drivers of these automobiles?

(Objection by Mr. Samuels.)

Q. I will say the experience of your company?

A. Yes.

Q. I will say that at any time the person getting these [fol. 87] automobiles may leave fictitious name, and because of the great number of accidents it is impossible to check up?

(Objection by Mr. Samuels; objection overruled by the court, and exception taken by Mr. Samuels.)

The Court: Have you ever been in this business?

A. In the driverless business, only from the insurance experience.

Mr. Samuels: You do not know whether they leave fictitious names?

A. I could not answer that from experience.

Q. Anyway, your company has found it is difficult in checking up on the accidents, and the large number of accidents, possibility of loss, etc., is sufficiently great to not justify the writing of this class of insurance?

A. The neglect on the part of the operator of the automobile to furnish reports or information as to an accident has made the risk so great that we would not carry it.

Q. Is that due in your judgment, Mr. Curry, to the management of these driverless concerns?

A. I would say no.

Q. Now if the concerns exercised greater scrutiny over the people to whom they lease these cars and made more thorough investigation so they could eliminate that neglect on the part of the rentees to a large extent, would that have effect on whether or not your company would write this insurance?

(Objection by Mr. Samuels; objection overruled by the court and exceptions taken by Mr. Samuels.)

A. From my personal experience in Cincinnati I would say that the companies that I have done business with

[fol. 88] on accidents that we have had reports on, in most of those cases were people with a complete investigation made and a favorable report made; and our failure to get the report of the accidents was not the fault of the driverless company but the fault of the rentee in reporting the accident.

Q. Do you think it would be possible to work out some method whereby that could be overcome?

A. If they cater to the class of business that they could check up on their references, and they live in Cincinnati and had families, or had business, that could be very easily done the same as it would in writing an individual policy.

Q. The fact is they allow people to take these cars indiscriminately, and in some cases they can not ascertain the correctness of their references?

Mr. Samuels: I object to that, this witness can not answer that.

The Court: I do not see how that has any bearing on the issue, but I do not want to limit counsel in getting into the record what he thinks of importance. The objection will be overruled.

(Exception taken to the ruling by Mr. Samuels.)

A. From our experience the check-ups with the people that they rented cars to on which accidents have occurred have been pretty thorough.

Q. They have standard rates provided for this type of insurance in the insurance manual?

A. Yes.

Q. And I believe your testimony was approximately $232.50 a year?

A. Those are the basic rates, those rates have not been changed in the past eighteen months.

[fol. 89] Q. Do you know what the rate is for taxicabs' insurance?

A. The basic rate of the conference companies is $475 per cab for the basic limits which you are speaking of here, five and ten thousand liability limits and one thousand property damage.

The Court: Judging from the taxicab rate, the driverless car rate, the companies consider taxicabs a greater menace as to insurance risk.

A. That is right, because there is a difference there that must be taken into consideration that if we reduce the passenger hazard in the taxicab that reduces practically 60 per cent. of our liability; the hazard on the taxicab is the passenger hazard, and if we eliminate passenger hazard that is the greatest risk we have.

Mr. Samuels: You take care of that in your rate on insurance?

A. Yes.

Mr. Samuels: And the rate on the pedestrian which would be in the driverless car would be greater?

A. That would be higher than the pedestrian hazard on taxicabs.

Q. Now do you know whether any companies operating in this city have this type of insurance?

A. Two companies to my knowledge.

Q. You say that the General Casualty Surety Company of Detroit will write policies of this nature?

A. I would not say that they would write them because I have referred other agents to that company because I understood they did write them, and they report back to me that they declined to write the business.

[fol. 90] Q. Are you acquainted with the Utilities Indemnity Insurance Company of St. Louis?

A. Only as most stock agents are acquainted with all reciprocals.

Redirect examination.

By Mr. Samuels:

Q. Mr. Curry, you say that of your own knowledge that information that you obtained was that the General Casualty Company has turned down some of this type of insurance?

A. Yes.

Q. Is it not a fact that what little they write is limited to people who do a national business; or business over a number of states?

A. I can not state that.

Q. Do you know anything about this Utilities Indemnity Exchange Company that Mr. Schmidt referred to, what type of company is that?

A. I would be unable to answer as to their——

Q. Is it a reciprocal or what?

A. Reciprocal exchange.

Q. What does that mean?

A. That means it is an assessment company.

Q. Are those financially responsible as a rule or not?

(Objection by Mr. Schmidt.)

Mr. Samuels: I will withdraw that question.

Q. What is an assessment company?

A. An assessment company is a company that is organized for the purpose of selling insurance to its subscribers at cost, and if the cost, or if the assessment levied at the inception of the insurance is not sufficient to take care of the losses incurred during the policy period that they reserve the right to make assessments against the subscriber or the policy holder.

[fol. 91] Q. That is in other words, each insurer is a stockholder in effect or has an interest in the company?

A. He assumes an additional liability.

Q. So that in effect over a smaller area it is the same as if he assumed his own liability, is it?

A. Same principle exactly.

Q. That is to say if the losses for one year are great he has that proportion to bear, and if smaller it is smaller?

A. Not individually but collectively.

Q. That is also known as a mutual company, is it?

A. No, sir.

Q. It is the same principle, is it?

A. There is a slight difference between reciprocal and mutual.

Q. I will not go into that, it is very analogous or similar?

A. Yes.

Q. You spoke before of a basic rate, what do you mean by that?

A. That is the rate at which the insurance is written at the standard limits of liability.

Q. That is subject to change?

A. Subject to change based on experience.

Q. You have no means of knowing what it would be a year from now, or two years from now from your data?

(Objection by Mr. Schmidt.)

A. I do not get the question.

Q. You have no means of knowing what it would be a year from now, or two years from now from your data?

(Objection sustained by the court, and exception taken by Mr. Samuels.)

Q. A year or two from now that rate may be changed based upon the experience of that period of time?

[fol. 92] (Objection by Mr. Schmidt.)

The Court: Objection sustained, he has answered that question.

Q. Your company has never written any of this insurance?
A. Yes.
Q. How long ago?
A. Two—three and four years ago.
Q. But since then you have abandoned that type of insurance, is that right?
A. I would not say that entirely.
Q. Well, you are not writing it?
A. No, sir.

Recross-examination.

By Mr. Schmidt:

Q. Not writing it?
A. No, sir.
Q. But this being regulated by the municipalities would that have some effect on it?
A. We would have to see what the regulations were.

(And thereupon witness left the stand.)

KARL F. GERLACH, called on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Samuels:

Q. What is your name, please?
A. Karl F. Gerlach.

Q. And your residence?
A. 3414 Whitfield avenue, Clifton.
Q. Cincinnati?
A. Cincinnati.
Q. What is your business?
A. Insurance broker.
Q. With what firm are you associated?
A. Perkins and Geoghegan.
Q. And what insurance company does that company represent?
A. Ætna Casualty and Surety Company.
[fol. 93] Q. What do you mean by that?
A. Casualty life insurance and bonding.
Q. Of the Ætna companies?
A. The Ætna company.
Q. I will ask you whether or not Mr. Barrs made application or requested information from you as to liability and property damage insurance on the automobiles known as driverless automobiles, those that are hired out to the operator by the owner of the automobile?
A. Mr. Barrs did make application.
Q. And are you familiar with that part of the city ordinances that requires liability and property damage insurance both as to the operator and the owner?
A. I am not, I have a slight knowledge of it.
Q. The application requested was as to insurance for the owner and the operator?
A. Yes.
Q. Would your company write that insurance?
A. The Ætna company does not write this class of insurance.
Q. Why?
A. From their experience they refused to write it.
Q. Did you make any inquiries from other companies?
A. I did.
Q. Whom?
A. Dieterly, and General Casualty of Detroit.
Q. State whether or not the General Casualty Company of Detroit would accept the business?
A. The General Casualty Company would not.
Q. Anybody else?
A. Walter P. Dolle & Company.
Q. Any others?

A. That is all.
Q. What about the Employers Liability Company?
A. I do not know about the Employers.
Q. Do you know whether any one in your office did?
A. I could not say as to that.

[fol. 94] Cross-examination.

By Mr. Schmidt:

Q. How many casualty insurance companies are there in the city other than those you made investigations of?
A. How many more are there?
Q. Approximately?
A. I do not know that I made any application to any other.
Q. You say you made inquiry as to the General Casualty of Detroit as to whether they would accept Mr. Barrs?
A. Yes.
Q. And the Walter P. Dolle Company?
A. Yes, that is the only one.
Q. How many others are there in the city?
A. I could not say off-hand.
Q. Could you give us an approximation of it?
A. I guess fifteen or twenty.
Q. Do you know why the General Casualty of Detroit would not write it?
A. From the information I received was to the effect that they had about as much as they cared to carry at the present time.
Q. They did not say they would not write any more?
A. They did not exactly say they would not write any more but they were not in position to do anything at the present time, which I reported back to Mr. Barr, when Mr. Barr asked me to keep busy and see what I would be able to do.
Q. The reason your company does not write it is because you think it is too great a risk?
A. When we do not write the business we try to place our experience—from our past experience.
[fol. 95] Q. Too many losses and too many accidents from this class of business?
A. That is from our past experience.

Redirect examination.

By Mr. Samuels:

Q. Do you know whether Mr. Kilday made inquiry of any other liability company?

A. I do not know, because Mr. Kilday is interested in the casualty business and he might have done so, I do not know.

Q. Will you ask Mr. Kilday to come up right away?

(And thereupon witness left the stand.)

William H. Hodge, called on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Samuels:

Q. What is your name, please?

A. William H. Hodge.

Q. Where do you live?

A. 2543 Moorman avenue.

Q. Cincinnati?

A. Cincinnati.

Q. What is your business or occupation?

A. President of the Hodge Drive-It-Yourself Company, 511 Sycamore street, Cincinnati.

Q. What is the nature of your business?

A. We lease automobiles to people who are able to furnish the proper references.

Q. How many automobiles do you have for the purpose of leasing or renting out?

A. Twenty-two.

Q. What types of automobiles are they?

A. New Fords, Chrysler, De Sota, Buicks.

Q. Tell the court the age limits of these cars, that is how long do you permit a car to be operated before you get a new one?

[fol. 96] A. We buy a new car and charge it off so much a month and generally spread it over twelve, and when it comes to our books where we can trade it in and get a new one and charge the same depreciation on the new one as on the old one.

Q. What is the effect of that?
A. About eight or nine months.
Q. Is any car operated longer than a year?
A. Very, very rarely.
Q. The Hodge Drive-It-Yourself Company that is an Ohio corporation?
A. Yes.
Q. What is the capital stock?
A. $25,000.
Q. How much is paid in?

(Objection by Mr. Schmidt; objection overruled by the court and exception taken by Mr. Schmidt.)

Q. How much is paid in?
A. Half paid in.
Q. State whether or not your company has paid to the state of Ohio the necessary license fee for the license tags?
A. It has.
Q. And what does that amount to?
A. $4 to $6 a car.
Q. Depending on the number of cylinders of the car?
A. The horsepower.
Q. And how long have you been in that business?
A. About three years.
Q. Have you had a license from the city of Cincinnati to operate up until 1929?
A. No.
Q. Have you made application for a license?
A. Yes.
Q. Explain why you have not had a license?
A. We made out applications——
Q. I mean why have you not had a license to March?
[fol. 97] A. The other license was continued until March 1 when this ordinance was passed.
Q. You did not get my question. You did have a license?
A. Yes.
Q. And you did not have to have another because it was extended until March 1?
A. Yes.

The Court: Is that an occupational tax?
Mr. Samuels: No, it is a license fee for the right to do business, they call it a license fee as distinguished from a tax.

The Court: That has been paid up until the first of March?

Mr. Samuels: Yes.

Q. And that was how much a year?

A. $8 per car.

Q. Have you made an application for a license from March 1 for this year?

A. Yes, sir.

Q. Have you been granted a license?

A. No.

Q. Why?

A. We generally fill out our applications with the safety director and he calls us when they are passed on and tells us to come and get the license.

Q. Has he advised you that one will be issued?

A. No.

Q. Has he advised you that one will not be issued?

A. Absolutely.

Q. What if anything did the director of public utilities, Mr. Gillman, state to you that he would do if you did not furnish property liability?

Mr. Schmidt: To save time we will agree that there has been no license issued because they failed to comply with the requirements, and unless restrained we will arrest the operators.

[fol. 98] Mr. Samuels: But you will not issue a license?

Mr. Schmidt: We will not issue a license.

Q. What business were you in before this drive-it-yourself business?

A. I was in the cabbing business.

The Court: What has that to do with this?

Mr. Samuels: This has no comparison with the taxicab ordinance and we do not come within that class, a taxicab is a public utility so-called, whereas this is a purely private vehicle, a private enterprise and over which the city has no control. I want the court to determine that these are two entirely separate and distinct businesses.

The Court: The court understands the different character of the two businesses, the difference in the way they are operated, and the court will take judicial notice, they do not haul any passengers, the court understands the distinction.

Mr. Samuels: And the city calls them public vehicles, which we claim they are not.

Mr. Schmidt: That is a matter for argument.

Q. Mr. Hodge, tell the court how your business is conducted, in other words how an automobile is leased, how it is given to a person, how it is returned, etc., describe the whole transaction by which a customer of yours may lease one of your automobiles.

A. We have a form application which requires their age, married or single, height, weight and color of eyes and hair, their next nearest relative, whether they have ever purchased anything on time at any place, and whether they carry a checking account or saving account, and then three reliable [fol. 99] references that are listed in the telephone book or city directory, we prefer those that are listed in the telephone book because we always call them when we investigate the applicant; and we ask them as to their knowledge of his ability to drive, also as to his character and his financial responsibility, and after we have called those three references, they are O.K.'d by the man at the desk, and if it passes he is considered a favorable applicant. We depend also upon the appearance of the applicant, his make-up, his credit, and there is a million ways to tell I claim whether a man is in business and whether he is reliable or not.

Q. State as to the references that are given, do you inquire of those persons?

A. Yes.

Q. And state what you ask?

A. I have explained that.

Q. All you ask of this individual you ask of these references?

A. Yes.

Q. You say you can pretty nearly tell whether a man can drive, how can you tell that?

A. When the car is brought up to the front you can tell when a man gets into a car the way he starts pretty nearly whether he can drive one.

Q. Suppose you seem to feel that he can not drive from his method of taking hold what do you do?

A. We take the car away from him.

Q. What deposit do you require as a security?

A. $10 on the smaller cars and $20 on the larger cars.

Q. What type of people have you found in your experience lease your cars?

A. It is when having their cars repaired——

Q. You mean car owners?

[fol. 100] A. Car owners, yes, and it is men that are truck drivers, cab drivers, men who have worked in places for a year or better and people who can not afford to buy an automobile and therefore they purchase it on what I call a retail price basis, they have never accumulated enough to buy an automobile but can rent one.

Q. How about professional men?

A. Often doctors and lawyers.

Q. What about salesmen?

A. Traveling salesmen are one of the greatest majorities.

Q. Can you tell the court what percentage of car owners lease your cars?

(Objection by Mr. Schmidt.)

Q. That is the person to whom you lease your cars, what percentage are car owners?)

(Objection by Mr. Schmidt.)

The Court: He may answer, but I do not see it has a great deal to do with this case.

A. About one-third.

Q. In your experience in the driverless automobile business how many damage suits have been filed against you growing out of injury to persons or property as a result of the negligent operation of the automobiles by the lessee or rentees?

(Objection by Mr. Schmidt; objection overruled by the court, and exception taken by Mr. Schmidt.)

A. In three years that I have been in business I have never had a serious or a personal injury claim.

Q. My question is have you had any suits?

A. No.

Q. How many claims have you had?

[fol. 101] A. I have never had a claim that was proven, I had a letter in regard to one, it was never presented.

Q. You had one demand made but never followed up?

A. Never followed up.

Q. And you have been operating twenty-two cars, have you?

A. Twenty-two cars.

Q. You made inquiry of Walter P. Dolle as to insurance under the ordinance?

A. I did.

Q. And that was refused?

A. Yes.

Q. Did you make inquiry of other companies?

A. He made inquiries.

Q. You did not personally?

A. No.

Q. And you heard that he said that the rate of this company who might was $232.50; what effect upon your business would the payment of a basic rate subject to increase if the risk becomes greater, on each of the twenty-two cars, have upon your business?

(Objection by Mr. Schmidt; objection overruled by the court and exception taken by Mr. Schmidt.)

A. At the present time we are facing a very drastic rate reduction in fact by one of the largest drive-it-yourself companies to almost half—the Ford——

Q. The question is how will it affect your business?

A. I am trying to arrive at that——

Q. As it is?

A. In face of the keen competition they would be very apt to take 15 cent cabs, and they would not take our cab when they can rent 15 cent cabs, and put us in competition with street cars, busses and other means of transportation. [fol. 102] Q. The insurance would have to be passed on, and raise your rate?

A. Absolutely.

Q. And that rate you say would have a tendency to practically destroy your business, that is competition with other taxi vehicles?

A. Yes.

Q. Have you on behalf of your company been able to get any insurance with anybody in accordance with the ordinance of Cincinnati?

A. None that I know of, I have as much as a lot of them I know would write it.

Q. Have you made inquiry as to the issuance of a bond by way of or in lieu of insurance?

A. Yes.

Q. Who?

A. The gentleman who testified before me.

Mr. Schmidt: That is a surety company, not bond.

Q. The same thing. State whether or not they would write such a bond?

The Court: We have gone into that.

Mr. Samuels: This is part of the ordinance that provides for the giving of a bond in lieu of the insurance, I have not gone into that.

The Court: He may answer that question.

Q. Would the Aetna Casualty Company write a bond for you?

A. The only way they would furnish a bond would be that you would deposit an insurance policy of five and ten thousand dollars, then they would issue a bond.

Q. In other words you would have to put up an insurance policy as collateral before they will sign a bond?

A. That is right.

Q. State whether or not automobiles are rented by your company or leased to any one who presents himself?

A. No.

[fol. 102] Q. Do you ever turn anybody down?

A. I would say at least one-third.

The Court: I do not think the court cares to go into that, of course they have to protect their business and protect their cars.

Mr. Samuels: If they were a public utility they have no right to turn down anybody, if a public utility they have to carry everybody.

The Court: That is a matter of argument.

Cross-examination.

By Mr. Schmidt:

Q. You say if you were compelled to pay the rates of insurance required it would drive you out of business?

A. It would have a tendency to do so.

Q. You said there was a rate reduction about to be put in force?

A. It is already in force.

Q. What system?

A. Saunders.

Q. Do you know whether they carry this type of insurance?

A. I understand they had.

Q. Do you know whether they are still carrying it?

A. I do not know.

Q. In other words they are carrying it and still continue in business?

A. But if they make the rate so high they will not be able to carry it.

Q. But the Saunders company carry it?

A. They were able to pass the buck the same as they were here.

Q. And you feel if you were compelled to do it it would ruin your business?

A. Because I am in one of those cities that makes it prohibitive.

Q. You do carry an item on insurance?

A. No item on insurance.

[fol. 104] Q. Do you calculate that in your rental charge?

A. No, the only thing is a service charge.

Q. What is that?

A. We maintain a service man and a man to take care of all the cars and spread it together.

Q. Don't you carry fire and theft insurance?

A. Yes, fire and theft.

Q. Do you pass that on to your customers?

A. That is in the service charge.

Q. You say you make very careful inquiry about the people who rent your cars?

A. Absolutely.

Q. What inquiry did you make of the two boys who rented a car of your company and committed a murder?

The Court: That is not in this case; I have allowed in a great deal that I do not consider of any importance in this case.

Mr. Schmidt: The question is in regard to what investigation they make as to the people who rent their cars.

The Court: Do you want to bring out they hired a car and that rentee went out and robbed somebody——

Mr. Schmidt: I want to find out what kind of an investigation they make; it goes to the necessity of investigation.

The Court: Would you say if he approved the sale of an automobile to somebody and he went out and committed a crime that he would be liable for that?

Mr. Schmidt: But this is of people who rent the automobiles.

The Court: So that is of people who are selling second hand cars; they sell them to all sorts of people and sell them very cheap, as cheap as they can rent them, you see great [fol. 105] numbers of them on the public streets; you can buy a car probably for $100, or for $10 second hand. Now of course they pass by and get out of the city sometimes and ordinarily over the country roads——

Mr. Schmidt: They may be subject to city regulations, but the fact that the city has not regulated them——

The Court: You will base that on one of them?

Mr. Schmidt: Not except that this company rented a car to one of these.

The Court: I know this business is of the type of the livery business, I was in the livery business and we were always very careful about whom we rented a horse to. I do not think those things have much to do with it just how they do their business.

Mr. Schmidt: I feel the same way but Mr. Samuels has been permitted to go into it at length.

The Court: You may ask it if you want to put it in the record, whether somebody hired one of their cars.

Q. Did you rent that car?

A. I do not know what car you are referring to, do you know the names of the boys?

Q. Do you mean to say you did not rent the car to the boys who wanted it to kill Mayhew on Reading road?

A. You are cross-examining me?

Mr. Schmidt: I object to that.

The Court: Did they have one of your cars?

A. If he would explain where the man was murdered.

Q. Last October at an oil station on Reading road?

A. I recall one Wetzel.

Q. Did you rent the car?

A. I think the police court would get the record.
[fol. 106] Q. Did you rent the car?
A. I did not, my company did.
Q. And one of those boys was nineteen years old?
A. One represented himself as twenty-one.
Q. Did you look up his record?
A. Absolutely.

Redirect examination.

By Mr. Samuels:

Q. And what were those records?

William H. Hodge, recalled for further cross-examination, having been previously sworn, testified as follows:

By Mr. Schmidt:

Q. You testified at the last hearing of this case that during the time you have been in business you had just one accident with your automobiles, is that correct?
A. There was one claim presented against us.
Q. How many accidents have you been charged with?

Mr. Samuels: I object, I might make a claim right now.

Mr. Schmidt: The question is the number of accidents those cars have been in, I do not think it is highly important in this case but nevertheless we are in the question of possibilities of danger and therefore we have a right to go into it.

(Objection overruled by the court, and exception taken by Mr. Samuels.)

Q. Can you answer that question?
A. There may have been numerous minor accidents, that is property damage.
[fol. 107] Q. I do not understand that.
A. There may have been numerous accidents for fenders bent but I do not think there were any serious claims for liability.
Q. How many claims for liability or personal injury?
A. I have no books with me and have no way of remembering that.

Q. What is your best estimate of that, as to injuries because of your machines?

A. You mean the driverless cars?

Q. Yes.

A. In this present company?

Q. The company you are connected with now?

A. There have been very few.

Q. How many?

A. I would like to have a little time to answer that because I have no way of remembering it.

Q. You can give us your best approximation of that?

Mr. Samuels: I object.

The Court: The question is how many suits against them.

Mr. Samuels: No; that would be proper, he has answered that.

The Court: The court will limit it to the number of suits pending, or I do not care if there is a general statement of what accidents they have had.

Mr. Samuels: I have no objection to that.

The Court: They are not using anything but the ordinary kind of automobile, are they?

Mr. Schmidt: They are using an automobile that is furnished by this company for transportation service over the city streets and we claim we have a right to license that kind of traffic, and he claims they had one accident.

[fol. 108] Mr. Samuels: One claim.

A. One claim, I said.

Q. How many accidents have there been, and personal injuries caused by your automobiles?

A. I am not able to answer how many.

Q. Can not you give us any information of your own?

Mr. Samuels: I object.

A. I think you could subpœna a man from the insurance company and he would have a better way of telling.

Q. I am asking you.

A. I have no way of telling that, the statistics that you have there is the first year we have been in business.

Q. Is it not a fact that there are more than fifty accidents caused by your cars since you have been in business?

A. The claims were not presented and never proven that they were my cars, they can claim they were but in check-

ing up the other fellow—you can claim that it was our car but in checking up however we will find the front of the other car ran into ours, and in checking into it we will find that it was the other car.

Q. You said but only one claim?

A. That is where an attorney wrote a letter and presented a claim in the proper way, because a fellow may come over and say I owe him $10 is no sign I owe him that, and because my machine was in an accident is no reason to say it was the driver of my car's fault.

Q. You do not know how many of the drivers of your cars have been arrested in the last year?

Mr. Samuels: I object.

A. I do not.

(And thereupon witness left the stand.)

[fol. 109] JOHN P. RYAN, called on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Samuels:

Q. Please state your name?

A. John P. Ryan.

Q. And your residence?

A. 344 Northern avenue.

Q. What is your business?

A. Manager of the local branch office of the Ætna Casualty and Surety Company, bonding department.

Q. The home office is at Hartford, Connecticut?

A. Hartford, Connecticut.

Q. Have any of the plaintiffs in this case, the Hodge Drive-It-Yourself Company, the Barrs Self Driver Company, the Durken Drive-It-Yourself or the Brady Driverless Company made inquiry of you as to whether you would issue a bond as required by the city ordinance for $10,000 for liability for personal injury and $1,000 property, in lieu of insurance?

A. Yes.

Q. State whether or not your company would write such a bond, and if so under what conditions?

A. They will not write such a bond.

Cross-examination.

By Mr. Schmidt:

Q. Why will not your company write such a bond?

A. Because it is not a bond proposition, it is a purely insurance proposition, and we would not consider it under the conditions in the ordinance, we would be liable as we would be for an individual accident, it might be one accident and it might be a thousand.

[fol. 110] Q. And the same reason——

A. The same reason it would burst us.

Q. In fact you do not write any bonds for liability and indemnity insurance?

A. No.

Redirect examination.

By Mr. Samuels:

Q. So far as you know no reputable company would write such a bond?

A. I have never heard of them writing them, and I do not think they would.

(And thereupon witness left the stand.)

William E. Barrs, Jr., called on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Samuels:

Q. Your name is what?

A. William E. Barrs, Jr.

Q. You live in Cincinnati?

A. Yes, sir, Reading road.

Q. What is your business?

A. Auto delivery, rent a car business.

Q. You are president of the Barrs Self Driver Company?

A. Yes.

Q. And your business is renting out automobiles where the person renting it drives it himself?

A. That is it.

Q. That is either on the day or hour basis?

A. That is right.

Q. How many automobiles do you use for that purpose?

A. Twenty-six.

Q. And how long has your company been in business?

A. A little over four years.

[fol. 111] Q. You have had a license from the city of Cincinnati prior to March 1, 1929?

A. Yes.

Q. And none has been issued since that time?

A. None as yet.

Q. You have made application?

A. I made application.

Q. And that has been rejected because you have not furnished any insurance policy or bond?

A. That is correct.

Q. What is the capital stock of your company?

A. $10,000.

Mr. Schmidt: I object, we are not concerned with the reliability of this company, liability or anything, they may be the best company in the world but it in no way bears on the power of the city to assess and license.

The Court: I think counsel is correct, but the court has been inclined to let counsel get into the record whatever they though- had some bearing upon the issues. Objection overruled solely on the ground that counsel may put into the record whatever they think may be of interest in the matter.

Q. What is your answer?

A. $10,000.

Q. How much is paid in?

A. All of it.

Q. What kind of automobiles have you?

A. Buicks, Fords, Chevrolet, DeSotas.

Q. What is the average life or use of a car, how long do you use a car before you get a new one?

(Objection by Mr. Schmidt.)

Mr. Samuels: I want to show that all these cars are in good condition, practically no car is over a year old. Question withdrawn.

[fol. 112] Q. When a person makes an application to lease one of your cars, what do you do?

Mr. Schmidt: I object.

The Court: I think we went into that the other day.

Mr. Samuels: Yes, I just want to identify their blanks and contract.

The Court: Go ahead.

A. They fill out an application and identify themselves.

Q. I show you two papers, one a blank form, and a contract, what are they?

A. Both used in our business, this is an application, and this a contract that the party signs when he leases a car.

Mr. Samuels: I offer these two papers in evidence, your Honor.

Said application blank was thereupon marked Exhibit 4, and rental contract blank marked Exhibit 5, are hereto attached and made part hereof.

Q. This paper marked Exhibit 4 is the application blank?

A. The application blank, yes.

Q. And the Exhibit 5 is the contract?

A. Yes.

Q. I will ask you if this application blank is filled out by the person or by you?

A. We ask the questions and fill it out and we follow it by 'phone calls.

Q. Do you check up the references?

(Objection by Mr. Schmidt.)

A. Every time.

Q. What type of people use your cars?

(Objection by Mr. Schmidt.)

The Court: You went into that the other day.

[fol. 113] Mr. Samuels: Yes, that is true, if it can be assumed that the same answer would be given, that they rent out to the same type of people.

Mr. Schmidt: I do not think that is the fact, and I object to the materiality of the evidence, in the second place we are not concerned with them.

(Objection overruled by the court and exception taken by Mr. Schmidt.)

A. All types, salesmen, business men, doctors, lawyers.

Q. Do you know whether any of the persons who rent your cars, as to whether or not they are automobile owners themselves?

(Objection by Mr. Schmidt; objection overruled by the court, and exception taken by Mr. Schmidt.)

A. Well I guess about fifty per cent. are.

Q. Fifty per cent. of your customers are car owners?

A. Yes, sir.

Q. What is the average yield per year of an automobile, I mean in the gross business per car, how much does a car produce on an average in gross business per year?

(Objection by Mr. Schmidt.)

Mr. Samuels: The reason for that is the insurance man testified the insurance is written on two bases, one is per car, and the other is the amount of business, and I want to show that this so unreasonable.

(Objection overruled by the court, and exception taken by Mr. Schmidt.)

Q. What is the average yearly gross yield?

A. Around $1,600.

[fol. 114] Q. I think Mr. Curry testified that you made application—no, that was Mr. Hodge. Did you make any application to any insurance company to try and get insurance?

A. I did, right away.

Q. From whom?

A. Mr. Gerlach of Perkins & Geoghegan.

Q. Did they write it?

A. Not as yet.

Q. Have they refused to write it?

(Objection by Mr. Schmidt.)

Q. Are they willing?

A. Not that I know of.
Q. Have they refused it?
A. Yes, sir; refused.
Q. Did you make application to Mr. Ryan of the Ætna Casualty Company?
A. I did.
Q. And he turned you down?
A. Turned me down.

Mr. Schmidt: I object to these questions, they are all leading.
The Court: I agree with counsel, they are leading.
Mr. Samuels: I agree with counsel also, but it is a matter of saving a little time.

Cross-examination.

By Mr. Schmidt:

Q. Who did you apply to for insurance?
A. Perkins & Geoghegan.
Q. And what word did you have?
A. They said they have been and are still trying, but have not yet found any company.
Q. And they have not as yet turned you down?
A. Inasmuch as they still say they are still trying.
Q. And they are still trying and they have not turned you down?
A. They say they are unable to get it.
[fol. 115] Q. They tell you they are still trying to get it for you, and have not informed you that it is impossible to obtain it?
A. In a way they have, and then again they have not.
Q. Which is it, they have or haven't they?
A. I don't know, they might be telling me that because they have some other insurance in view before telling.
Q. What other companies did you try?
A. Midland.
Q. What did they inform you?
A. Can not get it.
Q. What other company did you apply to?
A. That is about all.

Q. What companies told you that you could get it?
A. Mercer.
Q. They told you they would write you a policy?
A. Yes.
Q. And you told them you would probably give them the business?
A. I did.
Q. And you gave them all the data?
A. Yes, sir.
Q. And you told them the only reason you would not give them the business was you would wait for the outcome of this action?
A. I could not afford it.
Q. You entered into negotiations?
A. Yes.
Q. And gave them all the information required?
A. That is right, it is on account of the rates.
Q. And you have not given it to them?
A. I was waiting to hear what the rates would run.
Q. What were the rates?
A. Ten cents on every dollar.
Q. Are the rates for your cars the same as the Saunders System?
A. I do not know.
Q. How do they compare with the Kissel-Skiles?
A. I do not know.
[fol. 116] Q. Do you know anything about the Bohannah company rates?
A. I heard something this morning.
Q. Are their rates higher or lower than yours?
A. Higher, they have just been increased.
Q. But previously they were just the same?
A. A little lower, they figured differently, so many mills a mile, I believe it runs six mills a mile or something like that.
Q. Do you charge a service fee when a person rents a car?
A. Yes, sir.
Q. How much is that?
A. Thirty cents.
Q. What does that cover?
A. Service in driving the car in and out and giving them their road service.

Q. Does it actually cost you that much to provide that service?

Mr. Samuels: I object, that is a matter of contract, that is immaterial.

(Objection overruled by the court and exception taken by Mr. Samuels.)

Q. Will you answer that?

A. What is the question?

(Question read.)

A. It absolutely does.

Q. You do not make any profit on the thirty cents service charge?

A. Well we figure the cleaning of the cars, the upkeep of the cars, that all goes toward that.

Q. That comes out of your road mileage?

A. We have to figure that thirty cents in as a service charge.

Q. Did you charge in the rent fees any insurance charges?

A. None at all.

[fol. 117] Redirect examination.

By Mr. Samuels:

Q. Mr. Barrs, have you made any investigation as to the financial responsibility of the Mercer Insurance Company?

Mr. Schmidt: I object, that is a matter for the city auditor.

(Objection sustained by the court.)

Mr. Samuels: The only thing is they have brought out that a certain company will write it, and I want the financial responsibility of it. I say that no reputable insurance company will write it, and I claim this Mercer company is not a company of high standing.

The Court: Objection sustained.

(Exception taken by Mr. Samuels, who then made the following proffer: If permitted to answer the witness would state that he has not, but he would want to take the time to do that.)

(And thereupon witness left the stand.)

By Mr. Samuels: Let the record show by stipulation, that the Durken Drive-It-Yourself, operates 21 automobiles engaged in the drive-it-yourself business, so called:

Mr. Samuels: I want to offer in evidence the application blank, and contract, of the Durken Drive-It-Yourself.

Mr. Schmidt: I object, on the ground they are irrelevant.

(Objection overruled by the court and exception taken by Mr. Schmidt.)

The application blank and contract of the Durken Drive-[fol. 118] It-Yourself were thereupon marked Exhibit 6 and Exhibit 7, are hereto attached and made part hereof.

By Mr. Samuels: Let the record show that the Brady Driverless Taxicab Company operates five automobiles which they rent out under the drive-it-yourself plan.

HARRY H. BUXTON, called on behalf of plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Samuels:

Q. What is your name?
A. Harry H. Buxton.
Q. Where do you live?
A. 3021 Gloss avenue.
Q. What is your business?
A. Manager of Bohannan Rent-a-Car Company, 624 Walnut street.
Q. How long have you been manager?
A. In that present location?
Q. No, for the company.
A. I have been manager for them for one year.
Q. And prior to March, 1929, did your company carry a liability and property damage insurance?
A. Yes, sir.
Q. And what was the rate at that time?
A. It has been six mills per mile for the last two years, I believe it has been for two years.

Q. What if any change has been brought about in the rate since the date the City Ordinance No. 50 went into effect March 9, 1929?

(Objection by Mr. Schmidt; objection overruled by the court and exception taken by Mr. Schmidt.)

A. All that I can answer on that is the fact that I re-
[fol. 119] ceived a letter from Mr. Bohannan last week that it had been increased from six mills to nine mills.

Q. In other words it has been a 50 per cent. increase since this ordinance went into effect?

A. Yes, sir.

Cross-examination.

By Mr. Schmidt:

Q. How long have you been with the Bohannan company?

A. I have been manager for one year, and I have been with them since the first of April, 1926.

Q. Do you know of your own knowledge whether they carried this indemnity and liability insurance during that entire year?

A. I am pretty sure, I know we have carried it for a year previous to this time.

Q. That is before the ordinance requiring it they had carried it for one year?

A. Yes, I know that.

Q. Do you know whether they carried liability insurance before that?

A. I know that they carried liability insurance, but I do not know whether it was with the same company.

Q. This liability that you were carrying is the same kind of insurance for liability that is required under the ordinance?

A. Yes, sir.

The Court: Is that conceded to be true? As I take it this ordinance not only requires liability insurance for these rent-a-car companies, but it is aimed to protect the public.

Mr. Schmidt: Insurance under the ordinance covers all damage done by their cars whether the liability is on the car or the company.

The Court: That would be a pedestrian injured would [fol. 120] have an action against the driver of the car alone. Of course that is very ordinary insurance liability for the owner of a car, I carry that on my automobile, but if I loan my car to somebody, or they steal it, and are driving it, that is not a liability that policy covers.

Mr. Schmidt: That is correct in your case. But they must carry insurance covering their own liability and protect anybody who may be injured by their cars.

The Court: That is the question in line, I do not think that the insurance he is talking about has any bearing on this case.

Mr. Schmidt: The insurance he is referring to is exactly the kind of insurance that is required under the ordinance.

The Court: What you are insuring is the operators of these cars, the renters of these cars, you are requiring them to insure their liability.

Mr. Schmidt: It insures that company and it requires that the insurer may be responsible for any negligence of the driver of the car as well.

The Court: You are requiring them to secure liability insurance for the renters of the cars.

Mr. Schmidt: Exactly.

Q. Now, Mr. Buxton, this insurance that your company carried prior to the ordinance, was that insurance that covered the company and also covered any liability caused by the operation of your cars?

Mr. Samuels: I object, the policy is the way to determine that.

The Court: Of course the court has remarked three or [fol. 121] four times that counsel on both sides are traveling away out of this case; it is a question of the power of the city to make this regulation, and I think we can determine that question just as well without going into all the minute methods of business.

Mr. Schmidt: The petition says that it is impossible for these plaintiffs to operate in accordance with the ordinance, and I want to show that is not the fact.

Q. The question is whether the insurance that you carried prior to the new ordinance covered the liability of your company and the liability of all the persons who operate your cars?

(Objection by Mr. Samuels; objection sustained by the court.)

Q. Is it the same type of policy that is now required under the new ordinance?

A. It is the same policy with the exception of the rider which the city put on which has the same meaning that is in the policy as I read it——

Mr. Samuels: I object, and move that be stricken out.

The Court: That will go out. I will permit you to offer the policy. I think, however, counsel could agree that the insurance that this company had did not cover liability of the drivers of these cars.

Mr. Schmidt: I do not think that is the fact, it did cover drivers of those cars or lessees, they did that in order to protect their customers when they rented the cars. That is the system that the Kissel company and——

The Court: Offer the policy in evidence.

Mr. Schmidt: I will offer the present policy, I have not the old one.

[fol. 122] (Exception taken by Mr. Schmidt.)

Q. I will show you this policy of the Utility & Indemnity Exchange and ask you if that is the policy of the liability and indemnity insurance that you have at the present time? And I ask that it be marked for identification.

A. Yes.

Said policy was thereupon marked for identification, Id. 1.

(And thereupon the witness left the stand.)

And thereupon the plaintiffs through their counsel rested.

By Mr. Schmidt: Your Honor, I would like to make a formal motion of dismissal.

(Motion overruled by the court, and exception taken by Mr. Schmidt, counsel for defendants.)

And thereupon the defendants, to maintain the issues upon their part, offered the following evidence, to wit:

CLIFFORD D. HOFFNER, called on behalf of defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Schmidt:

Q. What is your name?
A. Clifford D. Hoffner.
Q. And your residence, Mr. Hoffner?
A. 1525 Chase avenue, Northside.
Q. What is your position?
A. Chief deputy city treasurer.
Q. And as part of your duties in that position do you have charge of insurance deposited by taxicab companies and driverless cab companies?
A. I do.
[fol. 123] Q. I will ask you if any company operating in Cincinnati has deposited insurance with you since the enactment of this new ordinance?
A. Covering taxies or just driverless?
Q. Covering driverless?
A. There have been, yes.
Q. How many have there been?
A. At least three or four.
Q. Do you know which companies those are?
A. Yes, sir; Kissel-Skiles is one, Thomas B. Bohannan doing business as Rent-a-Car company; I had a policy from Saunders company but I returned it on account of the rider not being attached to it.
Q. Are there any others?
A. I believe that is all that I recall.
Q. I will show you this policy of insurance marked for identification, Id. 1, and ask you if you know what this is?
A. Yes, sir.
Q. Will you state what it is?
A. It is a policy issued to cover a Rent-a-Car company by the Utility & Indemnity Exchange.
Q. That is the Bohannan Rent-a-Car Company?
A. Yes.
Q. And has been accepted by you as insurance under this ordinance?

A. It has been accepted by Mr. Steve McGrath, city treasurer, who also accepts the same as I do.

Mr. Schmidt: I would like to offer a copy as an exhibit in this case.

(Objection by Mr. Samuels; objection overruled by the court and exception taken by Mr. Samuels.)

[fol. 124] Copy of policy previously offered for identification and marked Id. 1, was thereupon marked Ex. A, is hereto attached and made part hereof.

Q. I show you this policy of insurance and ask you if you know what that is?

A. A policy issued by the General Casualty & Surety Company of Detroit, covering Kissel-Skiles.

Q. That covers the Kissel-Skiles company?

A. It does.

Q. Has that been accepted by the city treasurer?

A. Accepted by Stephen McGrath, city treasurer.

Q. And that is the new policy of insurance, covering insurance under the new ordinance of driverless cars?

A. It does.

Mr. Schmidt: I would like to offer this as an exhibit in this case.

(Objection by Mr. Samuels; objection overruled by the court, and exception taken by Mr. Samuels.)

Said policy was thereupon marked Ex. B, is hereto attached and made part hereof.

Q. Does the policy from the Saunders System, incorporated—was that presented to the city?

A. That was presented but I returned it on account of not having the new rider.

Q. When was it returned?

A. This morning.

Cross-examination.

By Mr. Samuels:

Q. You mean it was returned by Saunders to you?

A. I returned it to Saunders.

Q. Because it did not have the rider?

A. Yes, I was saving him a little time by not sending it through him.

[fol. 125] Q. Do you know what states in the Union that Kissel-Skiles operate in?

(Objection by Mr. Schmidt.)

A. I do not.

Q. You know they are not a local concern?

(Objection by Mr. Schmidt.)

Mr. Samuels: I am asking the general question because they might spread that over the whole country.

Mr. Schmidt: I object.

Q. And likewise your Rent-a-Car Company, they operate in a number of states, do they?

(Objection by Mr. Schmidt; objection overruled by the court.)

A. I only know from hearsay.

Q. You understand that to be the fact?

A. I have been advised so, yes.

(Objection and exception taken by Mr. Schmidt.)

(And thereupon witness left the stand.)

Henry S. Davidson, called on behalf of defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Schmidt:

Q. What is your name, please?

A. Henry S. Davidson.

Q. And where do you live?

A. President apartments, Greenwood and Reading road.

Q. What is your occupation?

A. Manager of the Kissel-Skiles company.

[fol. 126] Q. How long have you been connected with that company?

A. Since the fifteenth of December.

Q. Were you connected with the same company before that?

A. In Pittsburgh.

Q. How long?

A. A year and a half.

Q. That is the Driverless Automobile Company?

A. Yes, sir.

Q. You have insurance on your cars under the new ordinance?

A. Yes, sir.

Q. How many cars does your company operate here?

A. 57.

Q. Do you know whether or not your company had insurance of this kind previous to the adoption of the ordinance?

A. Yes, sir.

Mr. Samuels: I object to the form of the question, the comparison is not proper.

The Court: The best evidence would be the policy.

Q. Have you a policy of insurance carried by your company prior to the time the ordinance became effective?

A. I have it on file, but at the home office.

The Court: Covering your Cincinnati cars?

A. No, originally the policy was a blanket policy covering all operations, and since the city ordinance went into effect a policy was drawn to cover the Cincinnati requirements.

The Court: Your general policy covered the liability of your company?

A. Yes, sir.

The Court: Not the liability of the driver of the cars?

A. It covered the liability of the cars.

[fol. 127] The Court: The renters?

A. Yes, sir.

Mr. Schmidt: That is the fact with all these policies, we could produce the policies, but they are in the home office.

A. This policy is in the same form except the ten day cancellation—except five day, the blanket policy is the same as this except the rider.

The Court: Get the policy.

Q. Do you know what the rates are for that insurance?

A. To my knowledge it is five cents on the dollar.

Q. And is that charged as part of the rental for the car?

A. No, sir.

Mr. Samuels: I object.

(Objection sustained by the court, and exception taken by Mr. Schmidt.)

Q. Will you tell us how your rates compare with the rates of the Hodge company, the Durken company and the Barrs company?

Mr. Samuels: I object.

(Objection overruled by the court and exception taken by Mr. Samuels.)

A. I am not in position to compare them, I think they are practically the same, the two sets of rates read different but are practically the same.

The Court: In what way?

A. Two systems operate at a mileage charge and lesser mileage charge, but if you take fifteen or twenty trips at random and compute them they are practically the same in dollars and cents, the revenue is practically the same, two different ways of arriving at the same figure.

[fol. 128] Q. Is there a service charge in connection?

A. We charge a service charge.

Q. Does that cover the insurance feature?

A. No, sir.

Cross-examination.

By Mr. Samuels:

Q. The Kissel-Skiles is what you call a national system?

(Objection by Mr. Schmidt.)

Q. Well, it operates in a number of different states?

A. They have nine different operations.

Q. In nine different states?

A. Nine different operations, they have more than one branch in different cities.

Q. In how many different states do you operate?

A. Six to my knowledge.

Q. Six states?

A. Yes, sir.
Q. Do you know which they are?

Mr. Schmidt: I object to questions relative to whether this company is national.

The Court: I do not see why we always should travel so far afield.

Mr. Samuels: I quite agree with your Honor that the question is the power of the city, and I am attempting to show that this ordinance is so unworkable and absolutely impossible of performance, and the reason these people can get insurance is because they operate over a number of states.

The Court: Do you think the case is going to terminate on whether or not a particular person can get insurance?

Mr. Samuels: If the court maintains that the city had the power I am going to argue that.

[fol. 129] (Objection overruled by the court, and exception taken by Mr. Schmidt.)

Q. What are the states that you operate in?
A. Pennsylvania, Ohio, Kentucky, Indiana, Missouri, Kansas.
Q. How many cars have you all told, do you know?
A. I am not in position to say.
Q. How many cities in each state do you know, on an average?
A. How many what?
Q. How many cities in each state, on an average?
A. One.
Q. But you have nine altogether?
A. Yes.
Q. What insurance company carries your insurance?
A. General Casualty & Surety Company of Detroit.

Redirect examination.

By Mr. Schmidt:

Q. You can secure that old policy or a copy of it for me?
A. A copy of the policy previous to this?
Q. Yes.
A. Yes, I can.

(And thereupon witness left the stand.)

OVAH SAWYER, called on behalf of defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Schmidt:

Q. What is your name?
A. Ovah Sawyer.
Q. And your residence?
A. Mariemont.
Q. What is your business?
A. Drive It Yourself.
Q. With what company are you connected?
A. The Saunders company, Cincinnati.
[fol. 130] Q. How long have you been connected with that company?
A. In Cincinnati three years.
Q. How long previous to that?
A. One year.
Q. Where was that?
A. St. Joseph, Missouri.
Q. Has your company procured a policy of insurance under the new Cincinnati ordinance?
A. They have had one, yes.
Q. And they have one now?
A. Yes.
Q. What company has written that insurance?
A. Employers Indemnity Corporation.
Q. Where are they located?
A. Kansas City, Missouri.
Q. Are you familiar with the kind of insurance that your company had prior to the adoption of the Cincinnati ordinance?
A. The same policy.

Mr. Samuels: I object, and move that go out.
The Court: Offer the policy.

Q. Have you got a copy of the previous policy in your office here in Cincinnati?
A. I have not.
Q. Do you know where those old policies are retained?
A. The only policy that I have to date is the one that I had previous.

Q. What do you mean you had previous?
A. The same policy.
Q. The policy that you sent to the city hall in compliance with the city ordinance is the same policy that you had previously?
A. Yes.
Q. Does it contain a rider?

(Objection by Mr. Samuels.)

The Court: Offer the policy, the court will permit the record to be open so you can put it in.

[fol. 131] Q. Could you secure that policy for me?
A. Now?
Q. Have you got it with you?
A. Yes.
Q. Is this the policy that was submitted to the city?
A. Yes, sir, but there is a rider to be attached.
Q. What rider did they request to be attached to it, you want to return this policy to your own office I presume?
A. Yes.

Mr. Schmidt: With the right, your Honor, to submit this policy in evidence, and the previous policies which this company has been operating under, that is all the questions I have to ask this witness.

(Objection by Mr. Samuels; objection overruled by the court, and exception taken by Mr. Samuels.)

Q. How many cars do you operate?
A. Thirty.

Cross-examination.

By Mr. Samuels:

Q. Your company operates in a number of states does it not?
A. Yes, sir.
Q. How many?

(Objection by Mr. Schmidt; objection overruled by the court and exception taken by Mr. Schmidt.)

A. I do not know how many states.
Q. Approximately?

A. They operate in 56 cities.

Q. And about how many states would you say, your best judgment?

A. Twenty-seven.

Q. Twenty-seven states?

A. Yes.

(And thereupon witness left the stand.)

[fol. 132] CHARLES A. HINKLE, called on behalf of defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Schmidt:

Q. What is your name, and residence?

A. Charles A. Hinckle, 8387 Burns avenue, Hartwell.

Q. What is your business?

A. Insurance, general, 1112 Enquirer building.

Q. What company do you represent?

A. I represent the Northwestern of Milwaukee, Ohio Casualty of Hamilton, American Mutual of Indianapolis, three companies of Celina, Ohio, Mercer, Celina Mutual.

Q. Are any of these companies liability, that write liability and indemnity insurance?

A. Yes, sir.

Q. Will you state whether or not your company will write liability and indemnity under the terms of the Cincinnati ordinance?

A. We have one company that will undertake it, we have never written it, Mercer Casualty.

The Court: For what state?

A. Ohio.

Q. Have you taken applications for any of the plaintiffs in this case, Mr. Hinkle, for insurance of this kind?

A. I have talked to practically all of them that are involved in the injunction, but Mr. Barr is the only one that I took the cars—or that is prepared to handle insurance in case he must.

Q. You informed all these companies that your company was writing it?

A. I saw them and told them I was not interested in com-
[fol. 133] pelling them to carry insurance, but if the city said they must I was.

Q. What was the rate?

A. $9.90 on the gross earnings, that figures approximately 33 cents per day on a cab provided the cab earns $100 a month.

The Court: You mean a car?

A. Yes, a car, $9.90 per $100 gross earnings.

Q. Is there any other basis that you have of writing this insurance?

A. On the car basis, $222.50 per year.

Q. Do you know the rates for taxicab insurance?

A. Yes, sir.

Mr. Samuels: I object.

Mr. Schmidt: I think that is pertinent to show that courts have upheld in numerous instances in Ohio courts.

The Court: The taxicab is a common carrier, is it?

Mr. Schmidt: Yes, and this business is similar, subject to license by the city, and it is subject to the regulations which the city provides for that kind of an insurance; the claim is the rates are excessive, and I can say it is almost half charged for taxicabs.

(Objection overruled by the court, and exception taken by Mr. Samuels.)

Q. What are the rates for taxis?

A. $475 a year, a basic rate, and we come into the city three years ago and we are charging $312, the company I represent.

Cross-examination.

By Mr. Samuels:

Q. Do you know anything about the Mercer Casualty Company of Celina, Ohio?

A. $100,000 paid in capital stock three years ago.

[fol. 134] Q. How much is their reserve?

A. $31,000 beside the capitalization at the present time.

Q. How long have they been in business?

A. Three years, but they really have been in business you might say 14 years.

Q. This type of company?

A. Yes, this company.

Q. They have never written this type of insurance for driverless cars?

A. They have handled taxicab.

Q. I mean driverless?

A. No, because it is a new company and they are experimenting.

Q. And you state your directors are willing to give it a tryout?

A. Yes.

Q. That means if it works out satisfactory they will write and if not drop it?

A. They might raise the rate like some other companies are doing here.

Q. The basic rate is practically 10% on the cars' earnings?

A. Yes.

Q. And the car basis is $232.50, you were mistaken about that?

A. Yes.

Q. That is per car?

A. I know it figures about $17.50 a month, I have the letter in my office.

Q. Those rates are subject to change depending on the company's experience?

A. Yes.

Q. Subject to increase?

A. It might be lower.

Q. The basic rate is the bottom rate?

A. The basic rate is what the insurance companies have established in their manual.

Mr. Schmidt: I object to that.

Mr. Samuels: I think we have a right to know with whom we will insure as to the liability.

[fol. 135] Mr. Schmidt: I object to that.

Mr. Samuels: Any one who wants to take out insurance has a right to know what company to select.

(Objection sustained by the court, and exception taken by Mr. Samuels.)

Q. Your company has not written any insurance for any driverless company as yet?

Mr. Schmidt: I object.

A. It has not gone into effect.

(Objection overruled by the court, and exception taken by Mr. Schmidt.)

Q. You do not know whether the city has approved your policy or not?

A. I know they have approved them for the last two years, and I also know they will now.

Q. That is as far as taxicabs are concerned?

A. I know as far as driverless.

Q. How do you know?

A. Because I was told.

Q. But you have not submitted any policy?

A. No, I could not do that until I had the business.

Mr. Samuels: Yes.

(And thereupon witness left the stand.)

THOMAS R. BOHANNAN, called on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Samuels:

Q. Will you state your full name, address and business?

A. My name in Bohannan, Thomas. R., operator of the Bohannan Rent-A-Car Company at 624 Walnut street, Cincinnati; 400 North Twelfth street, St. Louis; and 314 North Grand street, St. Louis.

[fol. 136] Q. And you are not one of the plaintiffs in this case, are you?

A. No, sir.

Q. How long have you been in this driverless or rent-a-car business?

A. Since 1922.

Q. Since 1922 for yourself?

A. No, since 1926 for myself.

Q. State whether or not in March of 1929 you attempted to or did obtain insurance in compliance with the provisions of the city ordinance.

The Court: We don't care anything about what he did. Come to the point what you want to show here. Come to the point.

Mr. Samuels: That is the only way I can; he got the insurance and it was cancelled.

The Court: Well, ask him if the insurance was cancelled. We are not going to spread all over the United States in this matter.

Q. Mr. Bohannan, have you obtained insurance in compliance with the ordinance 50-1929 of the city of Cincinnati?

A. I did have it.

Q. With what company?

A. With the Lynton T. Block Company, through the Utilities Indemnity Exchange.

Q. What city?

A. St. Louis.

Q. State whether or not that policy has been cancelled by the insurance company writing that insurance?

A. It was cancelled.

Q. I show you here Exhibit A, attached to the transcript of the evidence, Utilities Indemnity Exchange, Rent-A-Car Company; is that your policy?

A. That was my policy, cancelled August 20, 1929.

[fol. 137] Q. Who cancelled it, you or the company?

A. The company.

Q. Did they give any reason?

A. They said they were not writing that type of insurance any more.

Q. State whether or not you made application with any other insurance company to try to get insurance in compliance with this ordinance.

A. I tried to get insurance from the American Insurance Company at St. Louis; the General Casualty Company of Detroit, the Lytton Brownell Company, who is a broker of insurance in St. Louis, and also the Hartford Insurance Company of Connecticut. The Hartford Insurance Company said that they were writing the Saunders system.

Q. Did you obtain insurance from any of those companies?

A. No, sir.

Q. Why not?

A. They said they were not writing that type of insurance.

Q. What about the Hartford company?

A. The Hartford company said they were writing the Saunders under one year contract purely as an experiment, but after one year they did not know whether they would be writing them or not.

Q. Would they write it for you?

A. Absolutely not.

Q. So you have no insurance today at all?

A. You cannot buy it.

Q. In your number of years experience in this business, state whether the number of claims for accidents were few or many?

Mr. Schmidt: I object.

The Court: Sustained.

[fol. 138] Mr. Samuels: (If permitted to answer the witness would answer there were very few.)

Q. The General Casualty Company that you speak of; is that the company in Detroit?

A. That is the company in Detroit, yes, sir.

Q. That is this company here, is it, the one that issued the policy to Kissel-Skiles, Inc., Exhibit B, attached to the transcript of evidence in this case?

A. Yes, sir.

Mr. Samuels: That is all.

Cross-examination,

By Mr. Schmidt:

Q. Did you ever apply to the Mercer company of Ohio for the insurance?

A. No, sir.

Q. Or to the Utility Exchange Company of Kansas City?

A. Yes, sir, that is the policy I had.

Q. Not the Utility Indemnity Company, the Utility Exchange Company, which insures the Kissel-Skiles Driverless Company?

A. I never heard of them.

(And thereupon witness left the stand.)

J. C. WELCH, called on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Samuels:

Q. State your full name, address and occupation, please.
A. J. C. Welch, 1416 First National Bank building, Cincinnati.
Q. Your business?
A. Manager of the automobile department of the Albert W. Schell and Company.
Q. What insurance company does Albert Schell repre-
[fol. 139] sent with reference to automobile casualty insurance?
A. Hartford Accident Indemnity Company.
Q. State whether or not you made inquiry of your company as to writing insurance for the driverless automobile companies in the city of Cincinnati under the provisions of ordinance number 50-1929 of the ordinance of Cincinnati?

Mr. Schmidt: I object. I do not think that is the question in this case, whether certain insurance companies will write this insurance.

Mr. Samuels: We claim no one will, they say they cannot comply with the ordinance.

The Court: We will hear it, we are going to finish very soon now, because your time is up.

A. We have quite a number of times in various companies.
Q. State whether or not your company will write insurance for any driverless cab company in Cincinnati?
A. They will not.

Questions by the Court:

Q. What is the objection of the insurance company to write this character of insurance?
A. Principally out-of-town men come in and rent cars, they will go out and drive, and they may have an accident which might kill somebody yet not damage the car, so the owner knows nothing at all of the accident. Naturally they want to get out without being tied up because they are busi-

ness men, they go out of town, we know nothing of it at all until the plaintiff walks in with a claim or suit and we go into court without a defense whatsoever. That is our prin- [fol. 140] cipal objection, and even if we do know about it, they are at distant points, they do not take time to get any witnesses, just bare testimony only, and it is costly to bring them back to testify, and it is a nuisance.

Q. Mr. Welch, from your experience in this type of business, state whether or not the hazard of this type of automobile business is greater or less or the same as any other automobile driving?

A. I would say it would be no greater than the ordinary private car.

Q. In other words, the car itself is no greater?

A. The car itself is no greater.

(And thereupon witness left the stand.)

And thereupon the defendants through their counsel rested.

And thereupon the plaintiffs through their counsel rested.

And the above and foregoing, with the exhibits hereto attached and made part hereof, was all the evidence offered by the parties or any of them on the hearing of this cause.

Thereupon, the court having heard the evidence and arguments of counsel, rendered its decision as appears of record herein.

Thereupon, afterwards, and within three days counsel for plaintiffs moved the court to set aside said judgment, order and finding, and for a new trial, which motion, after consideration, the court overruled, and to which counsel for plaintiffs then and there duly excepted, all of which appears of record herein.

Order Settling Bill of Exceptions

And now come said parties by their counsel, and tender [fol. 141] this their bill of exceptions, containing all the evidence introduced on the trial of this cause, the same having been filed with the clerk of the courts on the fourteenth day of April, A. D. 1930, being within forty days of the overruling of said motion for a new trial, and prays that

the same may be allowed, settled, signed and ordered to be made a part of the record herein, which is accordingly done.

Witness the hand of this court this twenty-second day of May, A. D. 1930.

Wade Cushing, Simon Ross, Francis M. Hamilton, Judges of the Court of Appeals, First Appellate Court, Hamilton County, Ohio.

EXHIBIT 1.

No. 50-1929

An Ordinance to modify and amend the provisions of the Code of Ordinances relating to public vehicles and public vehicle drivers by repealing Sections 65a to 65j, inclusive; 65-1 to 65-25, inclusive; 65-25a to 65-25e, inclusive, and 65-26 to 65-60, inclusive, and ordaining, in place of said sections, new Sections 63-1, 65-1a to 65-1g, inclusive; 65-2 to 65-48, inclusive, and 65a-1 to 65a-28, inclusive.

Be it ordained by the Council of the City of Cincinnati, State of Ohio:

* * * * * * *

Division D—Public Vehicles

* * * * * * *

Section 65-1a. The term "director" shall be held to mean the director of public utilities, or his successor.

[fol. 142] Section 65-1b. The term "public vehicles" shall apply to all vehicles furnishing individual service as a business in the transportation of persons, which are hereby classified as (1) public vehicles which seek their business, or a part thereof, on the public streets or quasi-public places, to wit: "taxicabs," and (2) public vehicles which use the public streets for the purpose of transporting passengers for hire, but which do not seek their business thereon, or in quasi-public places, to wit: "autosforhire," "driverless autosforhire" and "funeral cars."

Nothing herein shall apply to vehicles furnishing mass service, such as street railway cars, motor busses and omnibuses, which move over fixed routes, or on a fixed schedule, or between fixed termini:

Section 65-1c. The term "taxicab" shall include any public vehicle that seeks its business, or a part thereof, on public streets, or in quasi-public places.

Section 65-1d. The term "funeral car" shall include any public vehicle used solely for funeral or burial purposes.

Section 65-1e. The term "driverless autoforhire" shall include any public vehicle which is rented or hired out to a person other than the owner, and operated by the person renting or hiring the same for his own use and not for the purpose of transporting persons for compensation.

Section 65-1f. The term "autoforhire" shall include any public vehicle other than funeral car and driverless autoforhire that does not seek its business on the public streets, or in quasi-public places, and which is driven and in charge [fol. 143] of the owner or his employee. Public vehicles used for livery purposes are autosforhire.

* * * * * * *

Section 65-3. Application for Vehicle License.—Applications for licenses for public vehicles shall be made to the director upon blanks provided by the director, and shall set forth the name and address of the applicant, the trade name under which he does business, the class of vehicle for which the license is desired, the seating capacity, the design, color scheme and lettering and marks to be used on said vehicle, and any other information required by the director. If the application is granted, the applicant shall furnish the director, prior to the issuance of the license tag, with information covering the particular vehicle to be licensed, such information to include the make, the state license number, the length of time the vehicle has been in use, the motor power thereof, and the name and address of the person, firm, or corporation from which the vehicle was purchased, and any other information required by the director.

* * * * * * *

Section 65-5. Issuance of Funeral Car and Driverless Autoforhire Licenses.—The director shall investigate each application for license for a funeral car or driverless autoforhire, and if he finds that the applicant is the owner of the public vehicle for which the license is desired, and that such public vehicle is a safe and fit conveyance, he shall notify the city treasurer, who shall issue a license to the applicant upon payment of the proper license fee and the furnishing of the bond or insurance required.

* * * * * * *

[fol. 144] Section 65-7. Liability Insurance Required.—No license to operate any public vehicle shall be issued or renewed by the city treasurer, and it shall be unlawful to operate any such public vehicle, or permit such to be operated, unless and until the applicant shall deposit with the city treasurer a policy or policies of liability insurance issued by a responsible insurance company, approved as to sufficiency by the city treasurer, and as to legality by the city solicitor, providing indemnity for or protection to the insured against loss in the amounts provided for in Sections 65-8, 65-9 and 65-10, and agreeing to pay within the limits of the amounts fixed in said sections to any judgment creditor who shall have filed his suit or filed notice of a claim for such loss with the city treasurer during the license year in which the injury occurred or six months thereafter any final judgment rendered against the insured by reason of the liability of the insured to pay damages to others for bodily injuries, including death, at any time resulting therefrom, and for damages to or destruction of property sustained during the term of said policy by any person other than employees of the insured, and resulting from negligent operation, maintenance or use of such licensed public vehicles.

The policy of insurance aforesaid and the bond given in lieu thereof, as hereinafter referred to, shall provide that in case the vehicle is operated, maintained or used with the consent or acquiescence of the owner, by one other than the owner, his agent or employee, and an injury results to person or property as indicated above, due to the negligent [fol. 145] operation, maintenance or use of said vehicle, that the insurer or the obligors in the bond, as the case may itor shall have filed his suit, or filed notice of claim for such

be, shall pay to any judgment creditor of said person so maintaining, using or operating said vehicle any final judgment rendered against said person so maintaining, using or operating said vehicle, provided that said judgment creditor shall have the same rights against the insurer in the event of loss in all respects as is provided for the judgment creditor of the insured in the foregoing paragraph.

The policy or policies of insurance, and the sureties hereinbefore required, shall be valid and effective for no less a period than that for which the license is issued.

Section 65-8. Extent of Liability.—The extent of the liability of the insurer shall be, as to any one licensed public vehicle, the sum of five thousand dollars ($5000.00) on account of injuries to, or death of, any one person in any one accident; and subject to such limit as respects injury to, or death of, one person, ten thousand dollars ($10,000.00) on account of any one accident resulting in injury to or death of more than one person, and one thousand dollars ($1000.00) on account of damage to property in any one accident.

Section 65-9. Limitation of Liability for Property Damage.—In the case of property damage the insurer shall have the option of limiting his total liability as follows:

For not more than two public vehicles	$2000.00
For each vehicle in excess of two, not in excess of five	1000.00
For each vehicle in excess of five, not in excess of ten	750.00
[fol. 146] For each vehicle in excess of ten, not in excess of twenty-five	500.00
For each vehicle in excess of twenty-five, not in excess of fifty	300.00
For each vehicle in excess of fifty	200.00

Section 65-10. Additional Insurance.—Any insurer limiting his total liability as to property damage in accordance herewith shall notify the city treasurer forthwith of any insurance payments made on behalf of applicant which would operate to reduce the outstanding total limited liability. The city treasurer shall thereupon require adequate additional insurance and in the event of the failure of applicant to furnish the same on ten days' notice, his license or licenses shall be suspended until the required additional in-

surance is provided. Failure of the insurer to notify the city treasurer shall operate to maintain the total liability of the insurer without allowance for payments made.

Section 65-11. Bond in Lieu of Insurance.—In lieu of the policy or policies of insurance herein provided for applicant may furnish a bond executed by a surety company, authorized to do business in the state of Ohio, or by two personal sureties, approved as to sufficiency by the city treasurer and as to legality by the city solicitor, holding and binding the principal and sureties to the same liability, and subject to the same conditions as in the case of policies of insurance provided for hereunder. It shall further be permissible for the applicant to furnish insurance as to damages for personal injuries, including death, and an indemnity bond as to property damages, or vice versa.

[fol. 147] Section 65-12. Notice of Termination of Insurance or Bond.—Every such policy or certificate of insurance or bond shall contain a clause obligating the insurer or surety to give to the city treasurer at least ten days' written notice before the cancellation, expiration, lapse or other termination of such insurance, or the expiration, withdrawal of the surety therefrom or other termination of such bond; and the license granted shall expire upon the termination of the said insurance or bond, or upon the termination of the liability of insurer or surety thereon, in accordance with such notice, unless a new policy or certificate of liability insurance, or a new indemnity bond, approved as hereinbefore provided, shall be substituted therefor. Failure to give the notice required shall operate to continue the liability of the insurer or surety for the benefit of persons injured or damaged, as though said policy continued in full force and effect.

Section 65-13. Metal Tag.—At the time the license is issued by the city treasurer to the owner of any public vehicle, the city treasurer shall also issue to such owner a metal tag showing the class of public vehicle, the license number and the year for which issued. The tags for each class of public vehicle shall be numbered consecutively each year, except that tags for taxicabs shall be numbered to correspond to the body number assigned by the director. No tag shall be displayed on any public vehicle except the one for which it was issued. The tag shall be affixed to the

front of the vehicle so as to be plainly discernible at all times.

* * * * * * *

[fol. 148] Section 65-42. Director's Powers.—The director is authorized and empowered to establish and adopt such rules and regulations governing the issuance of public vehicle licenses and the inspection of public vehicles and their appurtenances as are reasonable and necessary, and not inconsistent with the terms of this division.

* * * * * * *

Section 65-45. Operation Without License, Penalty.—Any person, firm, or corporation operating or permitting to be operated for hire, an unlicensed vehicle, shall be fined not more than two hundred dollars ($200.00) or imprisoned for not more than thirty (30) days, or both; and in the event of conviction, such person, firm, or corporation shall not thereafter be granted a license for the vehicle concerned for a period of three months for a first conviction and one year for a subsequent conviction.

* * * * * * *

Section 65-47. Violation Penalties.—Any person, firm, or corporation, or any owner, agent, employee, or driver of a public vehicle who violates any of the provisions of this division, for which no other fine and/or imprisonment is specified, shall be fined not less than five dollars ($5.00) nor more than one hundred dollars ($100.00).

For the habitual violation of the provisions of this division the city treasurer, upon recommendation of the director, shall revoke the license for the vehicle involved.

Section 65-48. Appeals.—Whenever the director shall have refused to authorize a public vehicle license, or whenever the city treasurer has suspended or revoked a public vehicle license, the applicant, within ten (10) days after receiving notice of such denial, suspension, or revocation, [fol. 149] may appeal to the city manager. The city manager may either consider said appeal on the evidence produced before the director, or permit the introduction of new evidence, inspections, and tests. The decision of the city manager shall be final.

Provided, however, that when the director's refusal of a license shall be upon the grounds of public necessity and convenience, then the applicant, within ten days after receiving notice of such refusal, may appeal to the city council. The council may either consider said appeal on the evidence produced before the director, or permit the introduction of new evidence, inspections, and tests. The decision of the city council shall be final.

* * * * * * *

Section 3. Each section of the code of ordinances hereby ordained is hereby declared to be an independent section, and should any section or provision thereof be decided by any court to be invalid, void, or ineffective, for any cause, the ruling shall not affect the validity and effectiveness of any other section.

Section 4. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed February 6, A. D. 1929.

M. Seasongood, Mayor.

Attest: L. B. Blakemore, Clerk.

A copy of this ordinance is on file in the office of the clerk of council for public inspection.

[Clerk's certificate attached.]

[fol. 150] EXHIBIT 2

City of Cincinnati

No. 89—1929

An Ordinance Proyiding for the Issuance of 1929 Public Vehicle and Public Vehicle Drivers' Licenses and for the Fees for the Same

Whereas, on December 26, 1928, council passed an Ordinance No. 761-1928, extending the 1928 public vehicle and public vehicle drivers' licenses to February 28, 1929; and

Whereas, on February 6, 1929, council passed an Ordi-

nance No. 50-1929 modifying the existing rules and regulations governing the issuance and use of public vehicles and public vehicles drivers' licenses; and

Whereas, the said Ordinance No. 50-1929 changes the amount of fees for the licenses for public vehicles and public vehicle drivers, and will not go into effect until March 9, 1929; and

Whereas, the 1929 public vehicle and public vehicle drivers' licenses must be renewed on March 1, 1929; and

Whereas, it is desired to apply to said renewals, due March 1, 1929, the same scale of fees that will become effective March 9, 1929, now, therefore,

Be it ordained by the council of the city of Cincinnati, state of Ohio:

Section 1. All 1928 licenses for public vehicles and for public vehicle drivers shall become void on February 28, 1929. The issuance of 1929 licenses for public vehicles, either as renewals of 1928 licenses or as new licenses shall begin March 1, 1929, and, subject to all other provisions of [fol. 151] law and ordinance, such licenses shall be in effect until December 31, 1929. The issuance of public vehicle drivers' licenses for 1929, either as renewals of 1928 licenses or as new licenses, shall begin March 1, 1929, and, subject to all other provisions of law and ordinance, such licenses shall expire on the last day of February, 1930.

Section 2. Public vehicle licenses in effect on February 6, 1929, may be renewed for the year 1929 on March 1, 1929, subject to all other provisions of law and ordinance, upon payment of the following fees:

Taxicab	$20.00
Autoforhire	15.00
Funeral car	10.00
Driverless autoforhire	6.67

Section 3. License fees for public vehicle drivers beginning March 1, 1929, shall be $1.00 for renewals and $2.00 for new licenses.

Section 4. This ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of public peace, health and safety, and it shall go into effect forthwith. The reason for the said emergency is the

immediate necessity of properly providing for the control of public vehicle operation during the period from March 1 to 8 inclusive.

Passed February 20, A. D. 1929.

M. Seasongood, Mayor.

Attest: L. B. Blakemore, Clerk.

[Clerk's certificate attached.]

[fol. 152] EXHIBIT 3

Legal Notice

Extending License for Public Vehicles and Drivers

Notice is hereby given that on the twenty-sixth day of December, 1928, council of the city of Cincinnati, state of Ohio, passed the following:

No. 761—1928

An Ordinance Extending Existing Licenses for Public Vehicles and for Drivers of Public Vehicles to March 1, 1929

Whereas, council has under consideration an ordinance modifying the rules and regulations concerning the operation of public vehicles as defined by Section 65g of the code of ordinances; and,

Whereas, a reasonable time will be necessary for council to deliberate as to certain proposed changes in said rules and regulations; and,

Whereas, it is desired that during the period of deliberation the status quo as to such public vehicles be continued; now, therefore,

Be it ordained by the council of the city of Cincinnati, state of Ohio:

Section 1. All licenses for public vehicles, as defined in Section 65g of the code of ordinances, issued during the year 1928 in accordance with the provisions of Division D, Chapter 9, Title IV, of the code of ordinances, Section 65a. to 65-60, and now in force, are hereby extended to

March 1, 1929, provided that in the case of each licensed vehicle the owner shall:

(a) Pay to the city treasurer on or before January 2, [fol. 153] 1929, one-sixth of the respective fee provided by Section 65-1 of the code of ordinances;

(b) Furnish liability insurance or bond during such period, as required by Section- 65-25 to 65-25e, inclusive, of the code of ordinances.

Section 2. Except as expressly herein provided, all the provisions of Division D, Chapter 9, Title IV, shall apply to operation under such extended licenses.

Section 3. No licenses for public vehicles shall be issued by the city treasurer during the months of January and February, 1929.

Section 4. All licenses for drivers or operators of public vehicles issued during the year 1928, now in force, are hereby extended until March 1, 1929, without additional license fee. All licenses for drivers or operators of public vehicles issued during the months of January and February, 1929, shall be in force only until March 1, 1929, and shall be issued on the payment of a license fee of one dollar ($1.00) instead of the license fee required by Section 65-12 of the code of ordinances.

Section 5. This ordinance is hereby declared to be an emergency measure, necessary for the immediate preservation of the public peace, health and safety, and it shall go into effect forthwith. The reason for the said emergency is the immediate necessity of properly providing for the control of public vehicle operation during the interim between the expiration of the current license year and the going into [fol. 154] effect of the contemplated new rules and regulations.

Passed December 26, A. D. 1928.

M. Seasongood, Mayor.

Attest: L. B. Blakemore, Clerk.

A copy of this ordinance is on file in the office of the clerk of council for public inspection.

[Clerk's certificate attached.]

EXHIBIT 6

Durken Drive It Yourself, Inc.

Name ..... Phone No. .....
Home address .....
Business street address ..... Phone No. .....
(1) Reference ..... Phone No. .....
Address .....
(2) Reference ..... Phone No. .....
Address .....
Remarks: .....
Whom are you employed by? ..... Phone No. .....
Occupation .....
Address .....
How long .....
By whom were you employed before that? .....
Address .....
Name of next of kin to notify in case of accident .....
Address of next of kin ..... Phone No. .....
Driving experience of ..... years. Age .....
Weight ..... Height .....
Eyes ..... Hair .....
.....

For the Company. Customer.

[fol. 155] EXHIBIT 7

Rental Contract with Durken Drive It Yourself, Inc.

No. 2418. Date —— —, ——.

In consideration of obtaining rental service from your company, I covenant and agree that:

1. I will not use any car rented by your company by me for any unlawful purposes and to abide by all city ordinances, state and national laws.

2. That I will not sublet or loan said car to any third person.

3. That I will return rented automobile the same day that it is delivered to me unless permission is given by

company to retain automobile for a longer time. Violation of this provision will subject customers to criminal prosecution.

4. I agree to be liable for all damage to car other than ordinary wear and tear and will not carry more passengers than seating capacity permits.

5. I agree to immediately communicate with company of any accident or mechanical trouble and will follow instructions as given by them.

6. I will assume all responsibility, and will hold Durken Drive It Yourself, Inc., harmless, against damages growing out of my rental and use of car against persons or property.

7. I have inspected said car and have found same in good mechanical condition and will stand liable for any accesso- [fol. 156] ries that are lost or stolen while car is rented by me.

Deposit: ——.
Name: —— ——, Address: ——.
Type of Car: ——. No.: ——. Meter in: ——. Car In (Time): ——. Meter Out: ——. Car Out (Time): ——. Miles, ——, @ ——. Hours, ——, @ ——. Total: ——. Out by ——. In by ——.

STIPULATION RE EXHIBITS "A" AND "B"

It is hereby stipulated and agreed by and between counsel for plaintiffs in error and defendants in error, that Defendants' Exhibits "A" and "B", attached to and referred to in the bill of exceptions in the above entitled cause (the printing whereof has been dispensed with by order of court) are copies of automobile insurance policies, offered in evidence in the trial court by defendants in error, said exhibits being as follows:

"Exhibit A"

Policy of Utilities Indemnity Exchange, issued through Lynton T. Block & Company, agents, Chamber of Commerce building, St. Louis, Missouri, and being Policy No. A-83571; H. O. No. FXN-902016, issued to Rent-A-Car Company, 310 East Sixth street, Cincinnati, Ohio.

Expires February 17, 1930.

On the face of said policy appears the following endorsement: "Cancelled Aug. 19/1929. See correspondence."

[fols. 157 & 158] "Exhibit B"

Policy of General Casualty and Surety Company, home office, Detroit, Michigan. Automobile garage policy; A G No. 1086. Issued to Kissel-Skiles, Inc., et al., Cincinnati, Ohio. Expires March 1, 1930.

It is further stipulated and agreed by and between counsel that this stipulation may be entered in the record in lieu of the printing or attaching photostatic copies of the said insurance policies, offered in evidence as Defendants' Exhibits "A" and "B."

Julius R. Samuels, Attorney for Plaintiffs in Error.
Milton Schmidt, John J. O'Donnell, Assistant City Solicitors, Attorneys for Defendants in Error.

[fols. 159 & 160] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed May 1, 1931

Come now the appellants in the above entitled cause and say that for statement of the points upon which they intend to rely in this court, they adopt their assignments of errors as set forth in their petition for allowance of appeal. Said appellants further say that the whole of the printed record on file in the Office of the clerk of the Supreme Court of Ohio shall be used in the consideration of this cause.

Julius R. Samuels, Counsel for Appellants.

Cincinnati, Ohio, April 20th, 1931.

Receipt is hereby acknowledged of a copy of the Statement of Points to be Relied upon and Designation of the Parts of Record to be Printed.

John D. Ellis, Jacob Hauptman, Asst. Solr, Solicitor of the City of Cincinnati, Counsel for Appellants.

[fol. 161] [File endorsement omitted.]

Endorsed on cover: File No. 35,848. Ohio Supreme Court. Term No. 63. The Hodge Drive-It-Yourself Company, The Barrs Self Driver Company, Inc., and Durken Drive-It-Yourself, Inc., appellants, vs. The City of Cincinnati, Russell Wilson, Clarence Dykstra, et al., etc. Filed May 1, 1931. File No. 35,848.

FILE COPY

MAY 8

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 63

THE HODGE DRIVE-IT-YOURSELF COMPANY, ET AL.,

Appellants,

vs.

THE CITY OF CINCINNATI, ET AL.,

Appellees.

STATEMENT OF JURISDICTION.

JULIUS R. SAMUELS,
Counsel for Appellants.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 926.

THE HODGE DRIVE-IT-YOURSELF COMPANY, ET AL.,

Appellants,

vs.

THE CITY OF CINCINNATI, ET AL.,

Appellees.

STATEMENT OF JURISDICTION.

Come now the appellants in the above entitled cause and respectfully represent that this court has jurisdiction to review on appeal the judgment of the Supreme Court of the state of Ohio in this cause.

I.

STATEMENT OF CASE.

This action originated in the Court of Common Pleas, Hamilton county, Ohio, in which the parties stood in the same relation as they are in this court, the appellants being plaintiffs, and the appellees being defendants.

The appellants are all engaged in the business of renting or leasing automobiles to be driven by the renter

(said business being commonly known as the "driverless or drive-it-yourself automobile business") under contracts entered into between them and the persons renting or leasing their automobiles.

They brought their action against the city of Cincinnati, and the various officials thereof including the city manager, the mayor, the director of public utilities, the treasurer, and the chief of the police department of said city, to restrain the city and said officials from enforcing a certain ordinance of the city of Cincinnati, known as Ordinance No. 50-1929, passed on February 6, 1929 (effective March 6, 1929), on the ground that said ordinance and the pertinent sections thereof were invalid, unconstitutional and void, in that they violated Section 1 of Article 14 of the amendments to the Constitution of the United States, and various provisions of the Constitution of the state of Ohio, claiming that by the operation of said ordinance there is a taking of their property without due process of law, there is a denial to them of the equal protection of the laws and an interference with their inalienable right to acquire, possess and protect their property.

The principal provisions of the ordinance complained of were the following:

1. Designating the "driverless automobile for hire" (the automobile leased by appellants to their customers) as a public vehicle. (Secs. 65-1b; 65-1e.)

2. The requirement of an application for vehicle license and the payment of a certain license fees varying with the type of vehicle. (Secs. 65-3; 65-5.)

3. The requirement of persons engaged in the driverless automobile business of liability insurance policies or bonds in lieu thereof, to protect persons who might be injured or whose property might be damaged as the result of the negligence in the operation, maintenance or use of said automobile by the renter. (Secs. 65-7; 65-8; 65-9; 65-10; 65-11.)

4. The requirement of a metal tag on the automobile leased to renters designating the type of vehicle and other information. (Sec. 65-13.)

5. The powers vested in the director of public utilities to adopt rules and regulations. (Sec. 65-42.)

6. The drastic penalties prescribed for the violation of the said ordinance. (Secs. 65-45; 65-47.)

7. The limited appeal to the city manager without provision for appeal to a court. (Sec. 65-48.)

The case was tried to the court and was submitted on the evidence. The trial court found in favor of appellants and held said ordinance and the principal provisions thereof to be unconstitutional and in violation of the federal and state constitutions.

The case was appealed to the Court of Appeals (an intermediate reviewing court), where the case was again tried de novo and submitted to the court on the evidence, which was subsequently incorporated in a bill of exceptions, and the said court found in favor of appellees, holding that said ordinance was valid and constitutional.

The case was then taken on error to the Supreme Court of the state of Ohio (the court of last resort), which court affirmed the decision of the Court of Appeals and held said ordinance to be valid and constitutional and not repugnant to the Constitution of the United States.

II.

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The application for appeal was therefore allowed within three months after the entry of the decree of the Supreme Court of the state of Ohio, as provided for by Section 350, United States Code Annotated, Title 28.

IV.

AUTHORITIES.

United States Judicial Code, Section 237 amended; United States Code Annotated, Title 28, Section 344 (a):

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity; or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such state court and may, in its discretion,

award execution or remand the cause to the court from which it was removed by the writ."

United States Code Annotated, Title 28, Section 861 (a):

"The writ of error in cases civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtained by appeal."

In the case of Zucht v. King, 260 U. S., 174, it was held:

"A city ordinance is a law of the state, within the meaning of Par. 237 of the judicial code, as amended, which provides a review in the Supreme Court of the United States by writ of error, where the validity of the law is sustained, by the highest court of the state in which a decision in the suit could be had."

See also, Atlantic Coast Line Railway Company v. Goldsboro, 232 U. S., 548, and the cases cited at page 555 of the opinion of the court to the effect that a municipal ordinance is a statute under the judicial code.

In the case of King Manufacturing Company v. City Council of Augusta, 277 U. S., 100 (decided May 14, 1928), it was held:

"A municipal ordinance fixing rates for water power, which is sustained by the state courts against the objection that it violates provisions of the Federal Constitution, is within the operation of the act of Feb. 13, 1925, Chap. 229, U. S. C., Title 28, Par. 344, giving the Supreme Court of the United States jurisdiction to review by writ of error judgments of the state courts of last resort where is drawn in question the validity of a state statute on the ground of

it being repugnant to the Constitution or laws of the United States, and the decision is in favor of its validity."

See also,

Sprout v. City of South Bend, 277 U. S., 163;
Public Service, Inc. v. City of New Orleans, 281 U. S., 682; 684.

This cause is therefore one within the purview of the second clause of Section 237 of the judicial code as amended, since it draws into question the validity of a statute of the state of Ohio (Ordinance No. 50-1929 of the city of Cincinnati) which it is claimed is repugnant to the Constitution of the United States, the decision of the Supreme Court of the state of Ohio being in favor of its validity.

It is therefore respectfully submitted that upon the foregoing authorities, the jurisdiction of this court may be asserted in this case.

Respectfully submitted,

JULIUS R. SAMUELS,

Counsel for Appellants.

FILE COPY

SEP

CHARLES EL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 63.

THE HODGE DRIVE-IT-YOURSELF COMPANY, ET AL.,
Appellants,

vs.

THE CITY OF CINCINNATI, ET AL.,
Appellees.

BRIEF ON BEHALF OF APPELLANTS.

JULIUS R. SAMUELS,
Cincinnati, Ohio,
Counsel for Appellants.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio.

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IN THE

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OCTOBER TERM, 1931.

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THE HODGE DRIVE-IT-YOURSELF COMPANY, ET AL.,

Appellants,

vs.

THE CITY OF CINCINNATI, ET AL.,

Appellees.

BRIEF ON BEHALF OF APPELLANTS.

STATEMENT OF THE CASE.

This action originated in the Court of Common Pleas, of Hamilton county, Ohio, in which court the parties

stood in the same relation as they appear in this court, the appellants being plaintiffs and the appellees being defendants.

The appellants who were originally four in number, but who are now but three in number (see summons and severance, R. 4) filed their joint petition setting forth that they are all engaged in the business of renting or leasing automobiles to be operated by the person renting the car, said business being commonly known as the "driverless or drive-it-yourself automobile" business, under contracts entered into between them and the persons renting or leasing their automobiles.

The petition alleged, and the testimony proved the number of automobiles owned by each of them, the nature of their business, the number of years that each of them have been engaged in that business, and further showing that each of them had paid to the state of Ohio, a license fee of not less than four dollars ($4.00) for each automobile owned by them and used in their business, as required by the state law for the right to operate their automobiles in the state of Ohio.

They further alleged that by virtue of an ordinance passed by the city of Cincinnati on February 6, 1929 (effective March 6, 1929) the director of public utilities of the city of Cincinnati, in whom was vested the power by the ordinance, would not issue licenses to them unless they complied with the ordinance by paying certain license fees therein set forth, and unless they procured and deposited with the city treasurer, public liability and property damage insurance policies to protect per-

sons or property that might be injured or damaged as the result of the negligent operation of any of their automobiles by the persons to whom they might rent or lease the same.

They further alleged that it was impossible for them and others similarly situated and engaged in the same line of business, to comply with said ordinance insofar as the insurance policies or bond provisions thereof were concerned, for the reason that no reputable insurance company in good standing, acceptable to the city treasurer, would issue insurance policies for liability and property damage under the terms of said ordinance, and that even if such insurance could be obtained that the premiums for same would be so prohibitive as to result in a complete ruination of their business, with the resulting loss to them of their property and the good will in connection with their business; and that the same was true to even a greater degree with reference to the bond that was required by the ordinance in lieu of such insurance policies, as no bonding company would underwrite such bonds and certainly no private surety could be obtained under the circumstances.

They further alleged that the provisions of said ordinance with reference to the insurance policies or the bond in lieu thereof, were impracticable, unworkable and a vain thing, as it could not be complied with in any event, and that even if it could be complied with, it would in effect result in the creation of a liability on the part of appellants without fault on their part, from which they were exempt under the common law, in that

the payment of the insurance premiums, if insurance could be obtained, would equal if not exceed the possible liability that they might incur if the ordinance attempted directly to make them liable for the negligence of the persons to whom they might lease their automobiles.

They further alleged that their business is not such as is impressed with a public interest, within the meaning of the decided cases interpreting that term; nor that their vehicles are public vehicles as they are defined in the ordinance; that they are not engaged in the business of public or common carriers, and that therefore the city council exceeded its power in enacting said ordinance. They further alleged and claimed that said ordinance and the respective sections thereof complained of, were unconstitutional and void, being in violation and in contravention of the Fourteenth Amendment to the Constitution of the United States, and certain provisions of the Ohio Constitution.

The prayer of the petition was that appellees, the city of Cincinnati and its various officials, should be enjoined from enforcing said ordinance, from interfering with said business and with the operation of their automobiles by persons renting or leasing the same, that the ordinance and the respective sections thereof be declared to be unconstitutional, invalid and void, that a temporary injunction be granted pending the final determination of the cause, and that on final hearing said injunction should be made permanent. (See petition, R., 26-36.)

To said petition appellees filed an answer admitting

practically all of the allegations pleaded by appellants, but denying that it was impossible for appellants to comply with the insurance or bond provisions of the ordinance, and denying that the ordinance and the respective provisions thereof complained of, were unconstitutional, invalid and void, and prayed for a dismissal of appellants' petition. (See answer, R., 36-39.)

The ordinance in question, so far as the pertinent sections thereof were involved in this action, were set forth in the petition (see R., 27-32) and were offered in evidence at the trial (R., 97-103).

Upon the filing of the suit, a temporary restraining order was issued by the Common Pleas Court as prayed for in plaintiffs' petition on the execution of a bond of $1,000.00. Subsequently, the case came on for final hearing on the evidence, was submitted to the court, and after full and careful consideration, the court (Struble, J.) found upon the issues joined in favor of the plaintiffs, declared the various sections of said ordinance complained of to be unconstitutional, void and inoperative as to appellants, and a decree was entered accordingly, permanently enjoining and restraining appellees from interfering with the operation of plaintiffs' business and with the automobiles owned by them and operated by the persons to whom they are rented and leased; and further enjoining said appellees from instituting criminal proceedings against appellants or their agents or against the persons who might rent or lease appellants' automobiles. (See R., 24-25.)

An appeal from said decision was taken by appellees

to the Court of Appeals of the district (an intermediary court) where the case was tried de novo. The matter was submitted to that court, and after consideration that court found in favor of appellees and held said ordinance to be constitutional and valid and entered a decree dissolving the injunction granted by the court below and dismissing appellants' petition. (R., 40.)

Error proceedings were then prosecuted in the Supreme Court of Ohio (the court of last resort), where a petition in error was filed as a matter of right under the Ohio Constitution. After consideration that court affirmed the judgment of the Court of Appeals and likewise held said ordinance to be constitutional and valid. (R., 9.) Application for re-hearing was filed in that court and denied. (R., 9.)

In the appendix to this brief, there is included the opinion of Judge Struble of the Common Pleas Court (P., 44). The opinion of the Court of Appeals is reported in 38 Oh. App. 29; Vol. IV, No. 7, Ohio Bar, May 12, 1931, The opinion of the Supreme Court of Ohio in this case is reported in 123 O. S., 100; 175 N. E., 196, and appears at R., 11-21.

SUMMARY OF THE EVIDENCE.

On behalf of appellants, several witnesses testified including William H. Hodge, the owner of The Hodge Drive-It-Yourself Company, and William Barrs, Jr., the owner of Barrs Self-Driver Company, Inc.

William H. Hodge testified that his company is an

Ohio corporation, with a capital stock of twenty-five thousand dollars ($25,000.00) of which one-half has been paid up in cash; that it owns twenty-two outomobiles which it leases or rents to persons to be driven by them; that the average length of time that the automobiles are used are eight or nine months, when they are traded in for new automobiles, so that no old or badly used cars are maintained. That his company has paid to the state of Ohio for automobile licenses sums varying from four dollars ($4.00) to six dollars ($6.00) per car depending upon the number of cylinders. That his company had been in business for four years; that up to March 1, 1929, he had paid a license fee of eight dollars ($8.00) per car; and that on March 1, 1929, he made application for a license, which the director of public utilities of the city refused to issue unless he procured and deposited with the city treasurer insurance policies for public liability and property damage as required by the ordinance.

He further testified as to the method of doing business; as to the form of application blank which each customer must fill out, a copy of which was offered in evidence; and the inquiries they make as to the financial responsibility of the applicant, as well as to his ability to drive, which must be satisfactory to his company before they rent out a car. That a deposit of ten dollars ($10.00) on a small car, and twenty dollars ($20.00) on larger cars is required, and that the type of people that rent the cars are mostly car owners, truck drivers, cab drivers, people who have worked in one place of employment for a year or

more but who cannot afford to buy an automobile, including lawyers, doctors, and traveling salesmen, and that about one-third of the persons who rent their cars are car owners.

He further testified that since his company had been in business they have had no law suits filed against them, have never had any serious personal injury claims presented, the claims asserted being minor ones, namely, for bent fenders or other slight damage.

That the basic rate of two hundred and thirty-two dollars and fifty cents ($232.50) per car for insurance premiums required would tend to destroy their business in face of the keen competition they have in Cincinnati with the taxi-cab and traction interests.

The witness further testified he made application with a number of insurance companies to obtain such insurance as required by the ordinance, but that he could not obtain it. (R., 58-69.)

William E. Barrs, Jr., testified that his company is an Ohio corporation, with a capital stock of ten thousand dollars ($10,000.00) all of which has been paid in, and that he had been in the business of renting or leasing automobiles to be driven by the person leasing same for over five years; that his method of doing business is very much like that explained by Mr. Hodge, the details of which are in evidence, and copies of the application blank and contract of his company were offered in evidence and were very similar to those used by Durken Drive-It-Yourself Company, Inc.

He further testified that about fifty per cent (50%) of

the renters of his automobiles are car owners. That the average gross yield per car per year is sixteen hundred dollars ($1600.00); that he has tried to get insurance to comply with the ordinance in question from a number of insurance companies, but was turned down. That a small insurance company with a limited captal stock, to wit, the Mercer Insurance Company, of Celina, Ohio, had signified its willingness to underwrite such insurance at a rate of ten per cent (10%) of the earnings of each automobile per year, with a basic rate of two hundred and thirty-two dollars and fifty cents ($232.50) per car. (R., 70-76.)

The Durken Drive-It-Yourself Company, Inc., according to a stipulation entered into between counsel for both sides, would have testified that it operates twenty-one automobiles, and had been in that type of business for some time. A copy of its application blank and contract were offered in evidence as exhibits in the case. (R., 77; 107-8.)

The Brady Driverless and Taxicab Company, according to a stipulation entered into between counsel, would have testified that it is a partnership and that it operates five automobiles which they rent out on the drive-it-yourself plan. (R., 77.)

Harry H. Buxton testified that he was manager of the Bohannon Rent-A-Car Company, with offices in Cincinnati, Ohio, and St. Louis, Missouri, and that for two years his company had carried liability insurance. That the rate formerly was six mills per mile but since the ordinance was passed the rate was increased to nine

mills per mile. That his company had policies of insurance with the Utility and Indemnity Exchange of Kansas City, Missouri, and which policy, at the time of the hearing, was still in force, and that his company had complied with the requirements of the ordinance. (R., 77-80..) However, that policy was cancelled on August 19, 1929. (R., 108-109.)

Thomas R. Bohannon testified that he was the owner of the business operated under the name of Bohannon Rent-A-Car Company, with one place of business in Cincinnati, Ohio, and two places of business in St. Louis, Missouri. That he had been in the driverless or rent-a-car business since 1922, and had been in business for himself since 1926. That in March of 1929, he procured insurance as required by the ordinance with the Utility and Indemnity Exchanges of St. Louis, but that on August 20, 1929, that company cancelled the policy for the reason given that it would not write any more of that type of insurance. He further testified that he had made application with a number of other insurance companies, among them being the American Insurance Company of St. Louis, the General Casualty Company of Detroit, the Lytton Brownell Company of St. Louis, and the Hartford Insurance Company of Connecticut, but that he was unable to obtain insurance from any of them. That the Hartford Insurance Company informed him that they were writing insurance only for the Saunders System, for one year, as an experiment, and that they did not know whether they would care to write any more insurance or not after that and therefore would not take on

any more at that time. That at the time he testified he had no insurance as he was unable to procure any. (R., 92-96.)

John P. Ryan testified that he was the manager of the bonding department of the Cincinnati office of The Aetna Casualty and Surety Company of Hartford, Connecticut; that appellants had made application with his company for a bond as required by the ordinance in lieu of insurance policy; that he turned down their applications for the reason that his company would not underwrite such a bond; and he further testified that no other bonding company of standing would write such a bond as required by the ordinance unless full collateral security or insurance policies as required by the ordinance were deposited with the bonding company to indemnify it against loss. (R., 69-70.)

Karl F. Gerlach testified that he was associated with the firm of Perkins and Geoghegan, representing the Aetna Casualty and Surety Company, of Hartford, Connecticut; that he was asked to write this type of insurance under the ordinance, but that his company refused to write any of it. That he made inquiry of the General Casualty Company of Detroit, which company also turned down this type of insurance claiming that they had plenty of it and did not care to write any more. (R., 55-58.)

J. C. Welch testified that he was manager of the automobile insurance department of Albert W. Schell & Company, representing the Hartford Accident Indemnity Company. That he made inquiry of his company as to

writing insurance for the driverless automobile companies, under the provisions of the ordinance, but that his company would not write the insurance. He further testified that while the hazard of that type of automobile business is no greater than the ordinary private car owner insurance, the risk to the insurance company is greater, because out of town persons rent the cars, meet with an accident, and do not report it, and that if the insurance company is unable to get a complete report and full information concerning the accident, it is unable to successfully defend a lawsuit, and because of that fact a judgment might result against them. (R., 95-96.)

Frank Curry testified that he was associated with Walter P. Dolle & Company, of Cincinnati, who are agents of the Globe Indemnity Company of Newark, New Jersey. That that company would not write any insurance for any of the appellants, or any other person in that business, in accordance with the terms of the ordinance; that that type of insurance is classified as "driverless car insurance." That the basic rate of the premium for insuring the owners of that type of car, and the rentee, is two hundred and thirty-two dollars and fifty cents ($232.50) per car, irrespective of the number of cars operated. That another method of figuring the premium is by basing the rate upon earnings, but in no event does the rate go below the basic rate of two hundred and thirty-two dollars and fifty cents ($232.50) per car.

He also testified that he made inquiries of the United States Fidelity and Guaranty Company, and the Trav-

elers Insurance Company, as to writing this type of insurance for appellants or others in that business, but that those companies refused to write this type of insurance.

The witness further testified that the percentage of automobile owners who carry insurance for public liability and property damage in Hamilton county, Ohio, is 24% to 26%. That 74% to 76% of automobile owners are not insured, and that he obtained this information from statistics compiled by the various insurance companies writing automobile casualty insurance in Cincinnati, Ohio. That this type of insurance is considered by the insurance companies to be the greatest risk, as it is difficult for the insurance companies to obtain reports of accidents from the rentees.

That the larger insurance companies are members of what is known as the Casualty and Surety Underwriters Conference, and that no members of that conference will write that type of insurance, and that no companies of any kind, in or out of that conference, of any financial responsibility, with the possible exception of one or two, will write that insurance. That one of the companies that has written that type of insurance is the General Casualty and Surety Company of Detroit, but since the ordinance was passed, that company has turned down that type of business. A few of the larger companies have written this type of insurance some years ago, but have recently abandoned it, as they did not care for that business.

That one company, which is known as a reciprocal

company, by name, the Utilities Indemnity Insurance Company of Kansas City, Missouri, writes this type of insurance.

That "reciprocal companies" are members of the reciprocal exchange, which means assessment companies, under the rules of which its members who are insured may be assessed to make up losses, if they occur. That each insured is a stockholder, and assumes an additional liability, which amounts in effect to the insured being his own insurer.

The witness further testified that his company did write this type of insurance three or four years ago, but has since abandoned it. (R., 42-55.)

On behalf of appellees, the following testimony was offered:

Clifford D. Hoffner testified that he was chief duputy city treasurer. That the Kissel Skiles Company and the Bohannon Rent-A-Car Company, had deposited policies of insurance with him, as required by the ordinance. That the Saunders company had delivered a policy, which had no rider on it as required by the ordinance, and that he therefore returned it. That the Bohannon company's policy was with the Utility and Indemnity Company, and was acceptable to the city treasurer. That policy was offered in evidence in the case. The Kissel Skiles company's policy with the General Casualty and Surety Company was also acceptable to the city treasurer. (R., 81-83.)

Henry S. Davidson testified that he was manager of the Kissel Skiles company; that his company operates

fifty-seven automobiles, and that they carry insurance with the General Casualty Company and have complied with the ordinance. He further testified that the Kissel Skiles company is a national system, operating in six states in the Union. (R., 83-86.)

Ovah Sawyer testified that he was manager of the Saunders Drive-It-Yourself Company, having been associated with that company for two years, and that his company carried insurance with the Employers Indemnity Company of Kansas City. That his company operates thirty automobiles in Cincinnati, and operates in about fifty-six cities in twenty-seven different states. (R., 87-89.)

Charles A. Hinkle testified that he was an insurance agent, representing a number of companies, one of which was the Mercer Casualty Company, of Celina, Ohio, which company will write the type of insurance required by the ordinance. That the rate was nine dollars and ninety cents ($9.90) on each one hundred dollars ($100.00) of gross earnings on each automobile insured, or a basic rate of two hundred and thirty-two dollars and fifty cents ($232.50) per car.

That the Mercer Casualty Company has a paid in capital of one hundred thousand dollars ($100,000.00), with a thirty-one thousand dollar ($31,000.00) reserve. That the company was three years old, and that they are experimenting with this type of insurance.

That while his company was willing to write the insurance, it might be possible that they would be compelled to raise the rates as others are doing, or drop it

altogether, if their experience over a reasonable length of time proves unsatisfactory to them.

That the basic rate of practically ten per cent. (10%) of the gross earnings per car, is subject to change, depending upon the company's experience with this type of insurance.

He further testified that his company had not yet written any of this type of insurance because he had not yet obtained any, but that he was satisfied his company would be willing to write this type of insurance and that he believed that his company would be approved by the city treasurer although he had not submitted to the city treasurer any policies issued by his company. (R., 89-92.)

OUTLINE OF ARGUMENT.

The Ordinance in Question Is Unconstitutional, Being Violative of the Fourteenth Amendment to the United States Constitution, in that Said Ordinance and the Respective Sections Thereof Deprive Appellants of Their Property Without Due Process of Law and Deny to Appellants the Equal Protection of the Laws.

I.

The ordinance attempts to regulate a purely private business not impressed with any public character, and therefore it is not within the police power of the municipality.

II.

The ordinance attempts by legislative fiat to convert property used exclusively in a private business into a public utility and to make the owner thereof a public carrier with its burdens and duties.

III.

The ordinance is not a regulation of the use of the public streets of a municipality, nor is the business of appellants of leasing automobiles to be driven by lessees, a use by the lessor of the public streets for gain.

IV.

The ordinance attempts to impose upon appellants liability without fault, from which they are exempt under the common law.

V.

The ordinance is discriminatory as to appellants and the classification for regulation purposes of the automobiles leased by them is unreasonable and has no reasonable relation to the peace, safety and morals of the public.

VI.

The ordinance is harsh, oppressive, impracticable, and unworkable.

ARGUMENT.

The Ordinance in Question Is Unconstitutional, Being Violative of the Fourteenth Amendment to the United States Constitution, in that Said Ordinance and the Respective Sections Thereof Deprive Appellants of Their Property Without Due Process of Law and Deny to Appellants the Equal Protection of the Laws.

I.

The ordinance attempts to regulate a purely private business not impressed with any public character and therefore it is not within the police power of the municipality.

The principal provisions of Ordinance No. 50-1929 complained of are Sections 65-1b, 65-1e, 65-3, 65-5, 65-7, 65-8, 65-9, 65-11, 65-12, 65-13, 65-42, 65-45, 65-47 and 65-48 (R., 97-103).

To uphold the validity of the ordinance in question under the police power of the municipality and to justify the regulations therein contained, it is necessary that the business of appellants or the service rendered by them come within one of the two following classes:

(A) The business must be one impressed with a public character such as has been recognized from the earliest times and as is exemplified in the following cases:

Munn v. Illinois, 94 U. S., 113, where the charges of grain warehousemen were regulated; followed in Budd v.

New York, 143 U. S., 517, and in Brass v. North Dakota, 153 U. S., 391; Spring Valley Waters Works v. Schottler, 110 U. S., 347, and Van Dyke v. Geary, 244 U. S., 39, where the rates of gas and water companies and similar corporations were regulated; Noble State Bank v. Haskell, 219 U. S., 104, where the banking business was regulated; German Alliance Insurance Company v. Kansas, 233 U. S., 390, and O'Gorman v. Hartford Insurance Company, 282 U. S., 251, where the rates of fire insurance companies and the commissions of insurance agents were involved.

(B) The automobiles used by appellants must be operated as common or public carriers and special or extraordinary use made of the public streets for the purposes of gain, as is exemplified in the cases of Packard v. Banton, 264 U. S., 140; State, ex rel. McBride v. Deckebach, 117 O. S., 227, and numerous other cases representing an almost unbroken line of authorities.

Another ground for upholding laws of this character, but which is not pertinent here, is that of immediate necessity or emergency, as exemplified in the cases of Block v. Hirsch, 256 U. S., 134, and Wilson v. New, 243 U. S., 332.

The foregoing classification justifying the regulation of a business is set forth in the case of Wolff Packing Company v. Court of Industrial Relations, 262 U. S., 522, as follows:

> "Syl. 2. Business said to be clothed with a public interest justifying some public regulation, may be divided into three classes:

(a) Those which are carried on under authority of a public grant of privileges expressly or impliedly imposing the affirmative duty of rendering public service demanded by any member of the public, e. g., the business of a common carrier, or a public utility.

(b) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from the earliest times, has survived the period of arbitrary regulation of all trades and callings by parliament or colonial legislatures, e. g., inns, cabs, and grist mills.

(c) Other business which have come to have such a peculiar relation to the public that government regulation is being superimposed upon them, may where the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to regulation to the extent of such interest."

In that case the court laid down certain rules which apply with equal force in the instant case, as follows:

"Syl. 1. Legislative authority to abridge freedom of contract can be justified only by exceptional circumstances, and the restraint must not be arbitrary or unreasonable.

Syl. 3. A declaration by the legislature that a business has become affected with a public interest is not conclusive of the question whether attempted regulation on that ground is justified.

Syl. 4. In the present day one does not devote one's property or business to public use, or clothe it with a public interest, merely by making commodities for, and selling them to, the public, in the common callings.

Syl. 5. The option to deal or abstain from dealing, usually distinguishes private from quasi-public occupations."

As was said by Mr. Chief Justice Taft, at page 536 of the opinion in that case, when speaking of a business impressed with a public character:

> "In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well-being of the people. The public may suffer from high prices and strikes in trades, but the expression 'clothed with a public interest,' as applied to a business, means more than that the public welfare is affected by continuity and by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of Munn v. Illinois and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public."

(A) It hardly needs any extended argument to show that the nature of appellants' business is not such a one as is impressed with a public character, which makes it subject to police regulations, within the meaning of that term as defined in the case of Munn v. Illinois, supra. The Supreme Court of Ohio, in its decision in this case, apparently recognized that fact as that point is passed by without any comment and the decision makes no mention of it whatsoever.

The nature of appellants' business is no different from that of the old time occupation of livery stable keeper, who keeps teams and carriages to let for hire, as was observed by the trial judge and by the Supreme Court of the state of Washington in the case of State v. Bee Hive Auto Service Company, Inc., 137 Wash., 372. The

same distinction was clearly set forth by Mr. Justice Holmes in the case of The Terminal Taxicab Company v. Public Utilities Commission, 241 U. S., 252, in which opinion, at page 256, he said:

> "It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in the earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail any obligation to sell. It is assumed that an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that construction is not conclusive, German Alliance Insurance Company v. Kansas, 233 U. S., 387, 407, it is assumed that such a calling is not public as the word is used. In the absence of clear language to the contrary it would be assumed that an ordinary livery stable stood on the same footing as a shop, and there seems to be no difference between the plaintiff's service from its garage and that of the livery stable. It follows that the plaintiff is not bound to give information as to its garage rates."

It therefore follows that the ordinance in question cannot be upheld upon the authority of Munn v. Illinois, supra, and the cases following it.

(B) If it could be said that the automobiles used by appellants are being operated as common or public carriers, or that appellants are using the public streets for purposes of gain, which is special and extraordinary, then they would be subject to regulation.

It hardly needs any extended argument to prove that appellants are not common or public carriers. The Su-

preme Court of Ohio, in the instant case, recognized that fact in its opinion, and opposing counsel conceded in the courts below that appellants are not common carriers, claiming only that appellants were using the streets for private gain, which justified the exercise of the police powers of the municipality and the authority to impose the regulatory measures provided for in the ordinances.

The Supreme Court of Ohio, in the case of Motor Freight, Inc. v. Public Utilities Commission, 120 U. S., 1, recognized this rule when it held:

> "Syl. 3. Carriers operating under private contracts for carriage, are not subject to public regulation unless such carriers hold themselves out as willing to serve the public indiscriminately."

See also,

Hissen v. Guran, 112 O. S., 59.

In Allen v. Railroad Commission, 179 Cal., 68 (writ of certiorari denied by this court in 249 U. S., 601), it was held:

> "To constitute a public utility, the devotion to public use must be of such character that the public generally, or that part of it, which has been served, and which has accepted the service, has the right to demand that that service shall be conducted, as long as it is continued, with reasonable efficiency, under reasonable charges. Public use means the use by the public and by every individual member of it, as a legal right."

In State v. Bee Hive Auto Service Company, Inc., supra, it was held:

> "(2) Leasing automobile to be used only by lessee does not make lessor a public or private common carrier of passengers for hire."

At page 385, of the opinion, the court said:

> "It is true, of course, that the lessor, by the act of leasing, enters into certain obligations, so well understood as not to require enumeration here; but we think it manifest that he does not by the act undertake to carry any one and much less does he become by the act, either a public or private carrier of passengers for hire. His situation is no different, in legal effect from that of the old time occupation of livery stable keeper, who keeps teams and carriages to let for hire. No court, in so far as we are aware, has ever held such a keeper to be a common carrier of passengers and we think a like rule must apply to the defendants in this instance."

In State v. Dabney, 176 Ark., 1071, it was held:

> "One renting or hiring to individuals who applied therefor, automobiles, to be operated by the hirer at his own risk and discretion, was neither a private nor public carrier of passengers, and was not engaged in the business of using motor vehicles for transportation of passengers for hire, within the meaning of acts * * * requiring payment of tax in addition to registration fee."

In Jones v. Ferguson, 181 Ark., 522, it was held:

> "Syl. 4. Common carriers are subject to regulation, but a private carrier is not."

In the case of Smallwood v. Jeter, 42 Idaho, 169, it was held:

> "(10) Under presumption that legislature intends to keep within its power, Laws—1925, Ch. 197, providing for auto transportation companies furnishing insurance or bond to satisfy recovery for injury to passenger or damage to property, must be construed as applicable to common carriers only.

(12) The requirement of Laws—1925, Ch. 197, Sec. 3, that auto transportation companies furnish insurance or bond to satisfy recovery for injury to passenger or damage to property **is a regulation under the police power which can only be imposed on a public carrier as distinguished from a private carrier.**" (Heavy type ours.)

The case of Packard v. Banton, supra, which was relied upon by the Supreme Court of Ohio in the instant case, is clearly distinguishable. That case involved the regulation of taxicabs, which this court, at page 144 of the opinion in the Packard case, recognized to be common carriers for hire, and therefore as users of the streets for gain which was special and extraordinary and not such a use as a member of the public in the ordinary way. At page 145 of the opinion in that case, Mr. Justice Sutherland said:

> "Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right, and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissable in the former."

Since it is clear that the business of appellants is not impressed with a public character and that their automobiles are not operated as common or public carriers, their business is a purely private one which may be engaged in as a matter of right. Therefore the degree of regulation permitted in Packard v. Banton, supra, is not permissible in the instant case. As was stated by the trial judge with reference to the claim made by the

city that appellants are using the streets for private gain and therefore are subject to regulation as provided for in the ordinance:

> "It must be noted that plaintiffs are not using the public streets—it is their lessees that are using the public streets and they and their lessees are not making any private gain of such use of the streets other than what may be claimed as to others using automobiles on the public streets.
>
> Whether one using an automobile on the public streets owns the same or has rented or borrowed it, is not any test as to whether or not such person is using the public streets for private gain."

(See appendix, page 44.)

II.

The Ordinance Attempts by Legislative Fiat to Convert Property Used Exclusively in a Private Business Into a Public Utility and to Make the Owner Thereof a Public Carrier with Its Burdens and Duties.

Apparently the city council in passing the ordinance recognized the fact that neither the business of appellants nor the automobiles leased by them are subject to regulation unless they come within the category of public or common carriers, and therefore, by legislative fiat, the city council undertook to make them such, for Section 65-1B of the ordinance provides as follows:

> "Public vehicles. The term shall apply to all vehicles furnishing individual service as a business for the transportation of persons, which are hereby classified as (1) public vehicles which seek their business, or a part thereof, on the public streets or quasi-public places, to wit: 'taxicabs,' and (2) public

vehicles which use the public streets for the purpose of transporting passengers for hire, but which do not seek their business thereon, or in quasi-public places, to wit: 'autos-for-hire,' 'driverless autos-for-hire,' and 'funeral cars.'" (R., 97.)

Section 65-1E of the ordinances, provides:

"The term 'driverless auto-for-hire' shall include **any public vehicle** which is rented or hired out to a person other than the owner, and operated by the person renting or hiring the same for his own use and not for the purpose of transporting persons for compensation." (R., 98.)

If the automobiles leased by appellants or the nature of their business do not constitute them public or common carriers, then they cannot be made so by legislative fiat. In Smallwood v. Jeter, supra, it was held:

"(11) State cannot by legislative fiat convert property used exclusively in business of private carrier into a public utility, or make the owner a public carrier."

In Michigan Public Utilities Commission v. Duke, 266 U. S., 570, it was held:

"To convert property used exclusively in the business of a private carrier, into a public utility or to make the owner a public carrier by legislative fiat, is beyond the power of a state since it would be taking property for public use without just compensation in violation of the due process clause of the Fourteenth Amendment."

III.

The Ordinance Is Not a Regulation of the Use of the Public Streets of a Municipality, Nor Is the Business of Appellants of Leasing Automobiles to Be Driven by the Lessees, a Use by the Lessor of the Public Streets for Gain.

The city of Cincinnati has the right to regulate the use of automobiles or carriages kept for hire, and to license and regulate the use of the streets by persons who use vehicles or solicit or transact business thereon (Section 3632, General Code of Ohio.) But does that section of the Code, or the Home Rule Amendment to the Constitution of Ohio (Section 3 of Article XVIII) give the city the power to regulate the business of appellants? Since appellants are not public or common carriers, since they do not solicit or transact business upon the public streets and do not make a special or extraordinary use of the public streets for private gain, it seems that the power given the city by Section 3632, General Code of Ohio, or by the Home Rule Amendment to the Constitution of Ohio, does not include the regulatory measures adopted in the ordinance in question. The power of the city under the Ohio law and constitutional amendment aforesaid, with reference to the regulation of the use of the streets, includes such matters as designating speed of the automobiles, the stopping places, whether a street shall be used one way or two ways, and other similar instances with reference to the use of the streets by

vehicles, in the interest of the peace, safety and morals of the public. It is very obvious, however, that the ordinance in question is in no real sense a regulation of the use of the public highways.

In Frost Trucking Company v. Railroad Commission of California, 271 U. S., 583, in which was involved the validity of an act of California requiring private carriers operating automobiles for hire to obtain a certificate of public convenience and necessity from the state railroad commission before operating over state highways between fixed termini, which this court held to be violative of the due process of the Fourteenth Amendment, Mr. Justice Sutherland, at page 591 of the opinion, said:

> "It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. **Operation or conservation of the highways is not involved.**" (Heavy type ours.)

A similar observation was made by the Supreme Court of Ohio in the case of Village of Nelsonville v. Ramsey, 113 O. S., 217, where the court held:

> "City ordinance could not prohibit bus traffic on its streets when authorized by Public Utilities Commission when not reasonably necessary for safety of pedestrians upon the street, nor where no congested condition of street requires a detour from the established route in the city."

At page 226 of the opinion Judge Day quotes from the opinion of the judge of the Court of Appeals who wrote the opinion in that case in that court, as follows:

> "The council enacted the ordinance for the protection of the street railway company solely and the things stated in the ordinance as reasons for its enactment, namely, to relieve congested traffic, etc., are not true."

In Michigan Public Utilities Commission v. Duke, supra, in which was involved the validity of a statute of Michigan which imposed upon all persons engaged in the transportation for hire by motor vehicles over state highways, the duties and burdens of a common carrier, which include the giving of bonds of indemnity to secure payments of claims and liability resulting from injury to persons or property and which this court held to be violative of the due process clause of the Fourteenth Amendment, Mr. Justice Butler, at page 577 of the opinion, said:

> "Clearly the requirements (of the city) have no relation to public safety or order in the use of motor vehicles upon the highways, or to the collection of compensation for the use of the highways."

In Jones v. Ferguson, supra, it was held:

> "(5) The act regulating cars for hire using the highways (Acts 1927, C. 99) **does not regulate traffic on the highways, but regulates the business of the persons to whom it applies.** (Heavy type ours.)
>
> (6) A carrier operating a truck between two towns, not holding himself out to the public, but contracting with certain merchants to do their haul-

ing, held: 'A private carrier not subject to regulation.'

(7) Acts 1927, C. 99, regulating cars for hire, has no application to private carriers and is valid."

At page 527 of the opinion, the court quotes from Frost Trucking Co. v. Railroad Commission of California, supra, to the effect that the city does not regulate the use of the highways, but regulates the business of those engaged in using the same.

In Minnesota v. Robinson, 42 Minn., 107, there was involved a municipal ordinance, with reference to regulating persons engaged in the business of using vehicles upon the city streets, and it was held:

"The provision of the charter of the city of Minneapolis authorizing the city council to license and regulate hackmen, draymen, expressmen and all other persons engaged in carrying passengers, packages or freight, and to regulate the charges thereon, applies only to those who are engaged in business as carriers of persons or property for hire and not to those, who not being engaged in such business merely hire out teams and vehicles to those who have property to transport, the hirer himself using and controlling the team and vehicle."

In City of Rockford v. Nolan, 316 Ill., 60, it was held:

"(6) The power to open and improve streets and public ways and to regulate their use * * * **does not include the licensing of an occupational or business.**" (Heavy type ours.)

IV.

The Ordinance Attempts to Impose Upon Appellants Liability Without Fault, From Which They Are Exempt Under the Common Law.

It has long been the rule at common law that no liability can be imposed on one without fault or negligence and also, that a bailor in a contract of bailment for hire who does not retain control of the chattel, is not responsible to a third person for the negligent use by the bailee of a motor vehicle which is let for hire and over which the bailee is given sole custody and control.

In the case of the City of Rockford v. Nolan, supra, the rule as to the bailor and bailee is set forth, and it was held that the city and village act of Illinois did not authorize the enactment of an ordinance changing the rule.

On the subject of the creation of liability without fault or negligence, we cite the following cases:

Ives v. The South Buffalo Railway Company, 201 N. Y., 271 (which involved one of the first workmen's compensation laws); Ziegler v. South and North Alabama Railroad Company, 58 Ala., 594, which held invalid an act fixing absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without any wrong, fault or neglect on its part, when, under the general law, no one else is so

liable under such circumstances. On the same subject we also cite the following cases:

Birmingham Mineral Railroad Company v. Parsons, 11 Ala., 662;
The Ohio and Mississippi Railroad Company v. Lackey, 78 Ill., 55;
Jensen v. Union Pacific Railway Company, 6 Utah, 253;
Bielenberg v. Montana Union Railway Company, 8 Mont., 271;
Schenck v. Union Pacific Railway Company, 5 Wyo., 430.

We submit that to require appellants to pay the large premiums for the insurance policies at the rate of two hundred and thirty-two dollars and fifty cents ($232.50) per automobile, which is about sixteen per cent. (16%) of the gross earnings of appellant's business, as required by Sections 65-7, 65-8 and 65-10 of the ordinance (R., 99-100), is indirectly creating liability without any fault or negligence. The ordinance makes appellants indirectly liable for the negligence of their bailees, and therefore what cannot be done directly should not be permitted to be done indirectly. If the power to create such liability directly or indirectly resides anywhere, it would be in the state legislature and not in the city council, for it would in effect be a general law, and only the legislature of the state of Ohio has the power to pass a law of a general nature. (Section 26 of Article II of the Ohio Constitution.)

V.

The Ordinance Is Discriminatory as to Appellants and the Classification for Regulation Purposes of the Automobiles Leased by Them Is Unreasonable and Has No Reasonable Relation to the Peace, Safety and Morals of the Public.

The strict regulations and requirements of the ordinance in question, especially Sections 65-3, 65-7, 65-11, 65-13, 65-42, 65-45 and 65-47 (R., 98-102) are, as to appellants, discriminatory in a number of respects. The creation of liability without fault heretofore referred to does not apply to other bailors or to other persons. There is no requirement as to insurance policies or bonds, so far as individual automobile owners are concerned, or as to owners of trucks who might hire or lease them out to individuals. An individual might loan an automobile to another person, and even though the lendee might be negligent and injure another person, no liability exists on the part of the lender.

The city council has classified the driverless automobiles (the type of automobiles owned by appellants) as public vehicles, together with taxicabs, automobiles let out for hire with a driver, and funeral cars, all of which transport passengers for hire, and which are clearly public carriers; whereas the driverless automobile is leased or rented to a person who drives it himself, transports no passengers, does not use the public streets for the purpose of transporting persons, and the owners thereof

(appellants) do not seek their business on the public streets or in quasi-public places. A reasonable classification of this type of vehicle alone, without putting it in the class of a common carrier, might possibly be sustained, but the onerous burdens and liabilities of a common or public carrier are placed upon appellants whose business is a purely private one, which is not impressed with any public character, and who are not entitled to the privileges and immunities of public or common carriers.

The fact of the matter is that the ordinance was enacted for the benefit of the taxicab interests in Cincinnati, which also includes the Cincinnati Street Railway Company, and that the reasons given by city council for the enactment of the ordinance are not true, just as the court observed in Frost Trucking Company v. Railroad Commission of California, supra, and in Village of Nelsonville v. Ramsey, supra.

VI.

The Ordinance Is Harsh, Oppressive, Impracticable and Unworkable.

Sections 65-7 and 65-11 of the ordinances of the city of Cincinnati which require the furnishing of liability insurance policies or bonds in lieu thereof, are arbitrary, unreasonable, oppressive, impracticable and unworkable. The premiums demanded for the insurance (if insurance could be obtained, which cannot be done) is based upon the basic rate of two hundred and thirty-two dollars and

fifty cents ($232.50) per automobile, which is about sixteen per cent. (16%) of the gross earnings of appellants' business, as the testimony shows that each automobile of appellants averages approximately sixteen hundred dollars ($1600.00) per year in gross earnings (R., 73).

It is utterly impossible to obtain a surety bond (R., 70) and it is obvious that no private surety could be obtained. The testimony is uncontradicted that there are but two or three insurance companies that have written this type of insurance, none of the large companies writing any of it, that one of those companies has already abandoned it and one is merely experimenting with it (R., 93-94).

While we realize that the inability of a party to comply with a law without assuming an excessive burden does not render the requirement unconstitutional, if due to his peculiar circumstances (Packard v. Banton, supra); nevertheless in the instant case it appears that the appellants represent the majority of the drive-it-yourself companies in this city, who are unable to obtain this insurance at any price; and that only a limited number have been able to obtain the insurance because of circumstances peculiar to them, namely, that they are national organizations, with branch offices in various cities, and as to them one or two companies are willing to experiment. If this type of business is extra-hazardous to the public, as has been argued, then no insurance company will, after a reasonable experiment, insure this type of business. The protection, therefore, intended for the public is more illusory than real. There is no more reason to require the lessee of this type of automobile

to be insured than the individual automobile owner, and the hazard of the rented automobile is no greater than the hazard of the individual automobile owner, and it is certainly much less than the hazard arising from the indiscriminate sale of used automobiles by used car dealers, which are usually sold with down payments of five or ten dollars in cash and which automobiles are not only mechanically defective and not fit for use, but are generally sold to persons without financial or moral responsibility and very often to the criminal element.

There is no merit in the contention that the general public has no adequate remedy for personal injuries or property damage sustained, due to the negligent operation of rented automobiles by the driver, or as the result of the indiscriminate and negligent renting of the car by the owner.

If the renter of the car is negligent, the person injured has a remedy under the common law against the driver of the car causing the injuries, which remedy is as adequate under the present law as the remedy given to one injured through the negligence of a person driving his own automobile. If the owner of the car is negligent because of indiscriminate renting of the car to inexperienced or incompetent persons, or in knowingly renting an automobile which is mechanically defective and likely to cause injury, the injured person has a complete and adequate remedy against the owner of the car. (Elliott v. Harding, 107 O. S., 501, and many other similar cases.)

Sec. 65-2 requires a license fee of $8.00 for each vehicle operated by appellants in addition to the state license fee of $4.00 to $6.00 per vehicle.

Sec. 65-7, 65-8, and 65-10 require the insurance policies and Sec. 65-11 requires a bond in lieu of insurance.

Section 65-13 of the ordinances of the city of Cincinnati is discriminatory in that it requires unnecessary information having no reasonable relation to the public welfare, and not required of other automobile owners.

Section 65-42 of the ordinances vests legislative power in the director of public utilities of the city.

Sections 65-45 and 65-47 of the ordinances provide severe penalties for any infraction of the ordinance, the result of which would completely destroy appellants' business.

Section 45-48 vests final judicial authority in the city manager, without any resort to the courts, in effect ousting the courts of their jurisdiction.

SUMMARY OF AUTHORITIES.

The authorities upon the precise questions involved in this case are few in number, but we submit that the greater number are against the validity of the ordinance in question. The case of City of San Antonio v. Besteiro, 209 S. W., 472 (Tex. Civ. Ct. of Appeals) relied on by the Supreme Court of Ohio in this case, held that this type of business is subject to some regulation, but it did not pass upon the important points raised in that case, and involved in the instant case, for the reason that they were not properly brought into the record. That case was decided in 1919.

In 1928 the same court decided the case of Genuso v. City of Houston, 10 S. W. (2nd), 772. In that case the

same court reaffirmed the doctrine laid down in the Besteiro case, that the driverless automobile was subject to some regulation, but held that the insurance and bond provisions of the ordinance were invalid. The court in that case held:

> (5) "Ordinance of city of Houston, Section 194, requiring owners of driverless autos, before engaging in business of renting such automobiles, to furnish bond (or insurance policies) for benefit of persons injured by drivers of vehicles, regardless of whether driver be servant or agent of owner, imposes on owner liability from which he is exempt under the common law, and it is therefore inconsistent with Const. Art. II, Sec. 5, known as the Home Rule Amendment, and general law (Rev. St., 1925), Art. 1, putting common law of England in force, and ordinance is therefore void."

In the case of City of Rockford v. Nolan, supra, a somewhat similar ordinance was held to be invalid. In that case the court held:

> (9) "The rule that a bailor in a contract of bailment for hire, who does not retain control of the chattel, is not responsible to a third person for his negligent use by the bailee, applies where a motor vehicle is let for hire, and the bailee is given sole custody and control of the car, and the city and villages act does not authorize the enactment of an ordinance changing the rule."

Other cases involving the regulation and licensing of driverless automobiles and ordinances attempting to impose the onerous burdens and duties of common carriers, and all of which were held invalid, are:

State v. Bee Hive Auto Service Co., Inc., supra;
State v. Dabney, supra;
Jones v. Ferguson, supra; and
Minnesota v. Robinson, supra.

The only case cited by opposing counsel or by the Supreme Court of Ohio in its opinion, directly in point, and which upholds the validity of similar legislation, is that of Welch v. Hartnett, 215 N. Y. S., 541, which was a decision by a nisi prisi court of New York. That case is distinguishable in that it involved a state statute. Assuming for the sake of argument that the opinion in that case is sound, which we question very much, yet it involved a state statute or a general law. While the power of a municipality, within its jurisdiction, is as great as that of the state within its jurisdiction, where the field has not been pre-empted, nevertheless we maintain that the municipality has no power to regulate this type of business in the manner the city council has seen fit to do. It is only for the state legislature and not for the city council, for a state statute is a law of a general nature affecting all persons of the same class in the state equally and not discriminating between any of them; whereas, the ordinance discriminates as against residents of Cincinnati, in said state, but does not affect residents in any of the other cities in said state. Under the Ohio Constitution (Section 26, of Article II) "all laws of a general nature shall have a uniform operation through the state • • •"

We therefore respectfully submit that on the authority of the decided cases directly in point, the ordinance in question should be held invalid as violative of the Fourteenth Amendment to the Constitution of the United States. We further submit that the case of Packard v. Banton, supra, and the case of State, ex rel. McBride v.

Deckebach, upon which the Supreme Court of Ohio so much relied are limited in their application to public or common carriers and that therefore they are entirely distinguishable from the present situation. That the business of leasing automobiles, as appellants do, is not such a business as is impressed with a public interest, within the meaning of Munn v. Illinois, supra. That the designation of the type of vehicles used by appellants by the city council as "public vehicles," which attempts to make appellants public or common carriers by legislative fiat, is beyond the power of the municipality or any other legislative body; that even if the ordinance could otherwise be upheld in its present form, it is clearly impracticable and unworkable.

CONCLUSION.

We respectfully submit that said Ordinance No. 50-1929 of the ordinances of the city of Cincinnati, and especially Sections 65-1B, 65-1E, 65-3, 65-7, 65-8, 65-9, 65-10, 65-11, 65-13, 65-42, 65-45, 65-47 and 65-48, are unconstitutional, invalid and void for the following reasons:

(1) Said ordinance, and the respective sections thereof aforesaid, have no reasonable relation to the public health, safety and morals; are therefore not within the police power of the municipality, and are in contravention of the Fourteenth Amendment to the Constitution of the United States, in that appellants are deprived of their property without due process of law, and are denied the equal protection of the laws. That the automobiles owned by appellants, and the nature of appellants'

business, is not such as would justify the regulation attempted by the ordinance, their business not being impressed with a public interest, their automobiles not being used as common or public carriers, their business not being conducted upon the streets or in quasi-public places, they are not using the public streets for gain and are not making any unusual or extraordinary use of the public streets.

(2) Said ordinance, and the respective sections thereof, as aforesaid, are unreasonable, unduly oppressive, are an unjustifiable interference with a purely private business and are impracticable and unworkable.

We further respectfully submit that said ordinance and the respective sections thereof as aforesaid, should be declared to be unconstitutional and void as to appellants, and that the city of Cincinnati, and its respective officers, the appellees in this case, should be perpetually enjoined from enforcing those provisions of the said ordinance.

JULIUS R. SAMUELS,
Counsel for Appellants.

APPENDIX.

Opinion of Common Pleas Court.

Struble, J.:

The plaintiff companies are engaged in the city of Cincinnati, in the business of hiring out or leasing automobiles to persons who drive them themselves. The business these concerns are engaged in is a modernization of the livery business only they hire out automobiles instead of horses and buggies, and feed gasoline and oil instead of corn and oats.

The plaintiffs have obtained from the state of Ohio the usual motor vehicle license for each of their automobiles. But the city of Cincinnati has entered the field and by classifying plaintiffs' automobiles as "public vehicles" is requiring a city license for such automobiles, and as a condition to the issuance of the same, liability insurance, or a bond in lieu thereof.

On February 6, 1929, the city council of Cincinnati passed an ordinance No. 50-1929, effective March 9, 1929, regulatory of "public vehicles and public vehicle drivers," wherein it classified plaintiffs' automobiles as public vehicles requiring a city license for each automobile, the license fee to be $8.00 per year for each automobile.

Application for such license must be made to utility director (Section 65-3) upon blanks to be furnished by the director, and wherein there is to be set forth certain information required by the director.

The ordinance is a penal ordinance, and by the terms of the ordinance automobiles are not to be used in this character of business without a license.

By Sections 65-6 and 65-7 no license is to be issued, or renewed, nor any such automobile operated on the public streets unless and until there has been deposited with the city treasurer a policy of insurance which meets his approval, or in lieu thereof a bond.

This insurance or bond, within certain limitations, is to indemnify judgment creditors as against "any person other than employees of the insured, and resulting from negligent operation, maintenance or use of such licensed public vehicles."

Public vehicles are defined in Division D, Section 65-1b, as follows:

> "The term 'public vehicles' shall apply to all vehicles furnishing individual service as a business in the transportation of persons, which are hereby classified as (1) public vehicles which seek their business, or a part thereof, on the public streets or quasi-public places, to wit: 'taxicabs,' and (2) public vehicles which use the public streets for the purpose of transporting passengers for hire, but which do not seek their business thereon, or in quasi-public places, to wit: 'autosforhire,' 'driverless autosforhire' and 'funeral cars.'"

The classification here is sufficiently broad enough to include all public and private carriers, but the ordinance specifically exempts street cars, motor buses and omnibuses. The classification remaining includes taxicabs, funeral cars, autosforhire, and driverless autosforhire.

Counsel for the plaintiffs objects to the classification

of plaintiffs' automobiles as public vehicles, and makes the claim that plaintiffs' business is not a public business and that plaintiffs are not public or private carriers.

The ordinance defines the term "driverless autoforhire" as "any public vehicle which is rented or hired out to a person other than the owner, and operated by the person renting or hiring the same for his own use and not for the purpose of transporting persons for compensation." (Section 65-1e.)

The ordinance provides further, Section 65-1f, and "autoforhire shall include any public vehicle other than funeral car and driverless autoforhire that does not seek its business on the public streets, or in quasi-public places, and which is driven and in charge of the owner or his employee. Public vehicles used for livery purposes are autosforhire."

The ordinance gives a different definition for driverless autosforhire and autosforhire.

The cause before the court relates merely to "driverless autosforhire." This relates to automobiles that are hired out or leased to persons who drive them themselves.

The essential inquiry is as to whether or not plaintiffs' automobiles are properly classified as public vehicles, which in legal effect is classifying them as either public or private carriers, which is the business of transporting persons over the public streets for hire.

The designation "public vehicles" in any proper sense can only be applied to a vehicle used by a public or private carrier of passengers or freight for hire.

Counsel for the city concedes that the plaintiff companies are not common carriers, but claims that such concerns are using the city streets for private gain, and that the city on this ground in the exercise of its police

powers has the right to impose the regulatory measures provided for in the ordinance.

As to this claim of counsel for the city, it must be noted that plaintiffs are not using the public streets,—it is their lessees that are using the public streets; and they and their lessees are not making any private gain of such use of the streets otherwise than what may be claimed as to others using automobiles on the public streets.

Whether one using an automobile on the public streets owns the same, or has rented or borrowed it, is not any test as to whether or not such a person is using the public streets for private gain.

However this may be, it is not the basis or the ground of the regulatory measures set forth in the ordinance. The regulatory measures in this ordinance are based upon the theory that plaintiffs' automobiles are public vehicles, and that they are conducting their business upon the public streets. If this were so the city would not only have the right to regulate their use of the public streets, but would have the power to bar them from the use of the public streets.

The language of Sections 65-3 and 65-4 clearly indicates that the city council acted upon the theory that plaintiffs were public or private carriers of passengers for hire, and that city council had not only the power of reasonably regulating their use of the streets, but could bar them entirely from the use of the public streets.

The court recognizes that the city council in the exercise of its police power has broad powers of classification and probably could make a classification of businesses of this character and reasonably regulate them as a class. But this question is not before the court. City council has not done that.

Council has classified them as public vehicles, and the regulatory measures provided by the ordinance are based

upon the sole ground that these automobiles are public vehicles.

The evidence in this case shows conclusively that plaintiffs' automobiles are private automobiles, and that plaintiff companies are engaged in a private business.

In the case of State v Bee Hive Auto Service Company, 242 Pac., 384, decided by the Supreme Court of Washington in 1926, it was said:

> "(2) Leasing automobile to be used only by lessee does not make lessor a public or private common carrier of passengers for hire."
>
> "It is true, of course, that the lessor, by the act of leasing, enters into certain obligations, so well understood as not to require enumeration here; but we think it manifest that he does not by the act undertake to carry any one and much less does he become by the act, either a public or private carrier of passengers for hire. His situation is no different, in legal effect, from that of the old time occupation of livery stable keeper, who keeps teams and carriages to let for hire. No court, in so far as we are aware, has ever held such a keeper to be a common carrier of passengers and we think a like rule must apply to the defendants in this instance."

In the judgment of this court plaintiffs are engaged in a private business, and in the language of the court in State v. Bee Hive Auto Service Company, supra, a business "no different, in legal effect, from that of the old time occupation of livery stable keeper, who keeps teams and carriages to let for hire."

As a matter of fact plaintiffs' automobiles are not public vehicles, and the legislative fiat of the city council can not make them what they are not.

The ordinance of the city so classifying them, and regulating them, is inoperative as to plaintiffs.

A decree may be taken accordingly.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 63

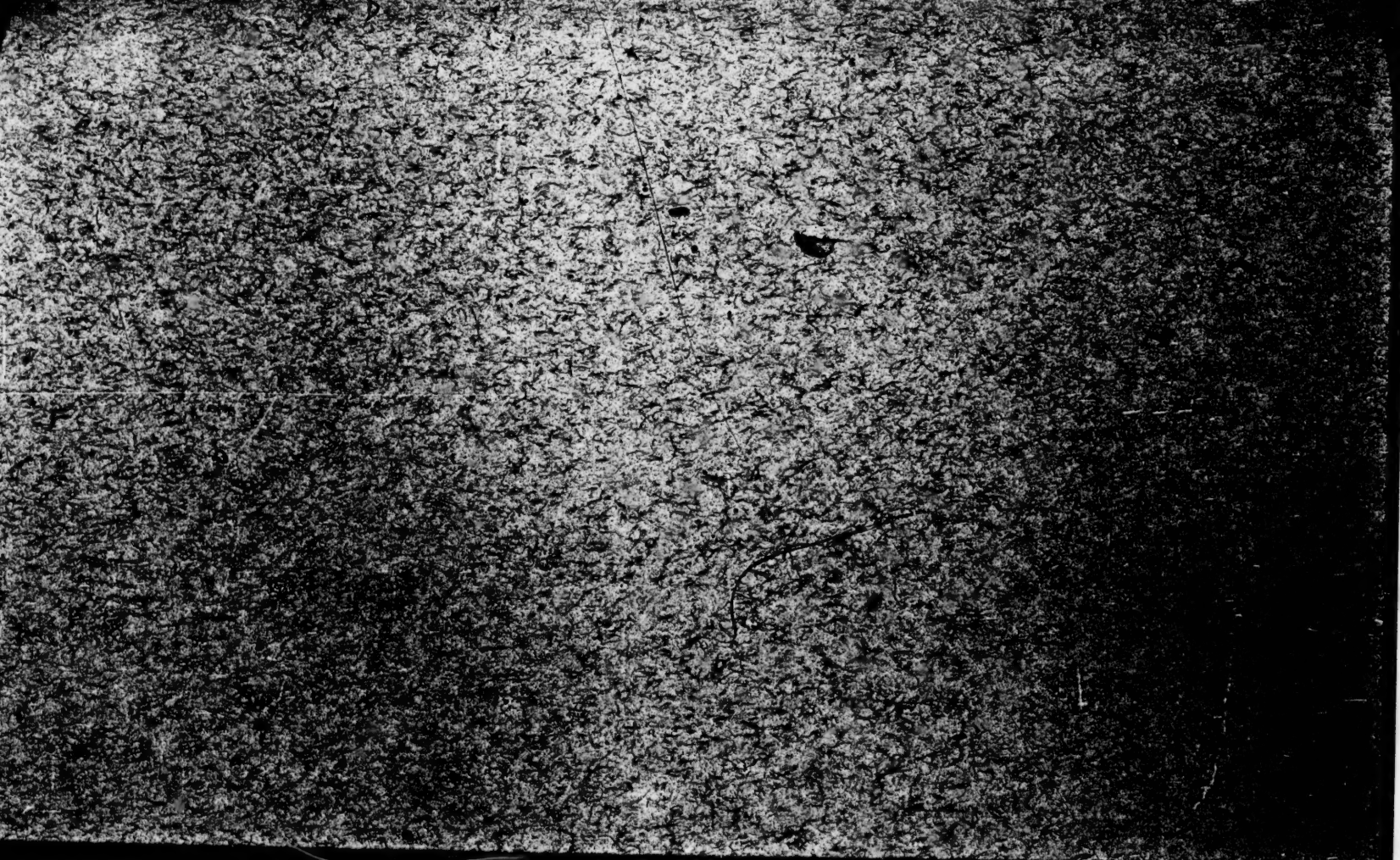
THE HODGE DRIVE-IT-YOURSELF COMPANY ET AL., APPELLANTS,

vs.

THE CITY OF CINCINNATI ET AL., APPELLEES.

BRIEF ON BEHALF OF APPELLEES.

JOHN D. ELLIS,
City Solicitor;
JACOB HAUPTMAN,
Asst. Solicitor,
Counsel for Appellees.



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BRIEF ON BEHALF OF APPELLEES.

The appellants, plaintiffs below, instituted proceedings in the Court of Common Pleas of Hamilton County, Ohio, alleging, in substance that Ordinance No. 50-1929 of the city of Cincinnati, Ohio, was unconstitutional, invalid, and void; and prayed that the defendant, the city of Cincinnati, and its various officials, be enjoined from enforcing said ordinance, from interfering with their business and the operation of their automobiles by the renters of the same. The defendants filed an answer admitting most of the facts pleaded, but denying the impossibility of obtaining necessary insurance for indemnity bonds as required by various sections of the said ordinance and denying

that the ordinance, or the respective provisions complained of, were unconstitutional and void and praying for a dismissal of the plaintiffs' petition. After the issuing of a temporary injunction by the Court of Common Pleas of Hamilton County, Ohio, on the filing of the suit the matter came on for final hearing on the evidence, was submitted to the court and the Court of Common Pleas (Struble, J.) found on the issues joined, in favor of the plaintiffs, declaring the various sections of the ordinance complained of to be unconstitutional and inoperative, as to the plaintiffs, and a decree was entered accordingly, permanently enjoining and restraining the defendants from interfering with the operation of plaintiffs' business.

An appeal was taken by the defendants to the Court of Appeals of the First Appellate District of Ohio where the case was tried on the transcript of the evidence, taken in the trial court, together with some additional new evidence presented to the appellate court. After consideration, the appellate court rendered its decision reversing the Common Pleas Court and holding said ordinance to be constitutional and valid and thereupon entered a decree dissolving the injunction, and dismissing the plaintiffs' petition. The Supreme Court of Ohio affirmed the Court of Appeals and its opinion is reported in 123 O. S. 284, 175 N. E. 196.

The plaintiffs contended that Sections 65-1*d*, 65-1*e*, 65-3, 65-7, 65-8, 65-9, 65-10, 65-11, 65-13, 65-42, 65-45, 65-47, and 65-48 of Ordinance No. 50-1929, of the city of Cincinnati (Record, page 97, Ex. 1) are unconstitutional. These sections in substance provide for the licensing and regulation of driverless or drive-it-your-

self automobiles, and impose the requirements that those companies engaged in the business of renting or leasing such vehicles carry insurance or secure surety bonds to indemnify persons for damage or injury caused by the negligent operation of the automobiles either by the companies themselves or by the persons renting the automobiles.

We contend that the ordinance is a valid and constitutional enactment for the following reasons:

1. The business of renting or leasing automobiles to be used to transport the lessee over the streets of the city involves the use of the city streets for private gain.

2. There is no right as such to the use of the streets for private gain, but such use may be regulated and even prohibited by the municipality under its police powers and under express statutory authority.

3. The requirement of insurance or surety bonds does not violate any constitutional provisions nor does it directly or indirectly create liability without fault.

4. The ordinance is neither oppressive nor unreasonable.

ARGUMENT.

1. The business of renting or leasing automobiles to be used to transport the lessee over the streets of the city involves the use of the city streets for private gain.

Plaintiffs complain against the ordinance principally on the ground that it is an attempt by the city to regulate a purely private business, that the leasing of auto-

mobiles to be driven by the lessee does not place the lessor in the status of a common carrier, and that therefore the business is not clothed with any public interest which subjects it to regulation. In order that there may be no misunderstanding as to the issues, we desire to emphasize at the outset that it is not the claim of the city that concerns operating driverless automobiles are common carriers. The ordinance nowhere classifies these vehicles as common carriers. The power of the city to regulate vehicles which use its streets is not limited to the regulation of those which fall within the definition of common carriers, but extends as well to all vehicles which are used upon the streets in connection with the maintenance of a business operated for the purpose of providing a transportation service. Therefore the question of whether or not common carriers are involved is not pertinent to the issue.

The pertinent question to be answered in this case, therefore, is whether the business of the plaintiffs is a business which involves the use of the public streets for the purpose of gain or profit. This question, we submit, can be answered only in the affirmative. The plaintiffs are in an entirely different position from those who use the streets in the operation of pleasure vehicles, or those who operate delivery vehicles or trucks as a necessary incident to the selling of merchandise or similar business activities. *The business of the plaintiffs is to create a profit for themselves by furnishing a transportation service.* They are in precisely the same position as the taxicab companies in that both businesses are based upon obtaining a rental

from the use of the city streets by their automobiles. Both taxicabs and driverless automobiles are rented on a mileage basis. The fact that a driver is furnished with a taxicab and that none is furnished with the driverless car is a difference clearly insufficient to render legal principles which the courts hold applicable to the one, inapplicable to the other.

The Supreme Court of Ohio says in its opinion (123 O. S. 284, 175 N. E. 196, at page 198):

> "Concededly, the automobiles are rented on a mileage basis and for operation over the public streets, so that for every mile of travel for which a rental fee is exacted of the lessee, a mile of public street has been used in earning such rental fee, and, while the use of the public street by the lessee has been a use of such streets by a member of the public in the ordinary way, such use by the lessor has been a use for his own gain, just as the use of the streets by street cars, busses and taxicabs is a use by them for their own gain."

In all of the cases in which the courts have been called upon to decide whether the driverless automobile companies are engaged in an extraordinary use of the public streets and therefore subject to the police authority of the city, the courts have held that the business is public in its nature. We have found not a single case to the contrary.

In the *City of San Antonio* v. *Besterio*, 209 S. W. 472 (Texas Civil Appeals, 1919) the court passed upon a question similar in all respects to that involved in the instant case. At page 474 the court uses this pertinent language:

"The argument that appellees in effect sell their automobiles and that the entire transaction is completed upon their own premises is unsound. The business of renting automobiles to the public for temporary use over the streets of San Antonio is not the private use by an individual of his property * * * the contention that the use of the streets forms no part of the business conducted by appellees is sophistical. The chief element of value to this business is that their automobiles can be and will be used upon the streets of the city. * * * The quintessence of the business is to obtain a rental from the use of the streets by its automobiles. That this use of the streets is contemplated, intended, and forms a real thing of value to defendant's business is so obvious as not to require discussion." The business of the appellees is to derive a profit for themselves by the operation of their automobiles over the streets of San Antonio just as the street railway company, jitney, and service companies do. The fact that these last mentioned companies have the driving done by employees and the appellees have it done by the lessees does not change the result that appellees' business is to burden the streets in the conduct of its business. There is greater necessity, it seems to us, for the city to regulate the use of the streets when the driving is done by lessees instead of employees. Where the automobiles are driven by employees over whom the employer has supervision and control, there is likely to be less danger to the public and the immoral uses possible can be more readily checked than when the automobiles are promiscuously if not indiscriminately left to the public. Since the busi-

> ness contemplates and does make use of the streets, the business is subject to license and regulation by the city."

Counsel for plaintiffs attempts to discredit this Texas decision by asserting that the power which the city of San Antonio has under its charter and under the state laws was much broader than that possessed by the city of Cincinnati. This claim is without foundation in fact, for, as we will show by reference to the Constitution and Statutes, the city of Cincinnati has complete home-rule authority and power to regulate the use of its streets.

Furthermore, and aside from the provisions of the charter of the city of Cincinnati, as was found by the Ohio Supreme Court in its opinion below, the city of Cincinnati has specific power of regulation of its streets conferred upon it by Section 3632 of the General Code of Ohio. The court said (175 N. E. at page 199):

> "We do not find it necessary to determine whether the city of Cincinnati derives its power to enact the ordinance in question under the home rule provision of the Constitution of Ohio, since, if the power be not there conferred, it has been specifically conferred by Section 3632 of the General Code of Ohio, which provides that municipalities shall have the power 'to regulate the use of * * * automobiles * * * kept for hire * * *.'
>
> The power of the municipality, within its jurisdiction, in reference to regulating the business of leasing automobiles to be driven by the

lessee, is as great as that of the State within its jurisdiction."

In *Welch* v. *Hartnett*, 215 N. Y. S. 541, 127 Misc. Rep. 221, 1926, the court held that the operation of driverless automobile companies was affected with a public interest, that the rental of these cars involved the use of the public streets for gain, and that therefore a regulation similar to the ordinance of the city of Cincinnati was a valid and constitutional provision.

Syllabus 1 of this case reads:

"The use of streets for purposes of gain is special and extraordinary and generally may be prohibited or conditioned as legislature deems proper."

At page 222 the court says:

"Subdivision 4 of said section which is applicable to the plaintiff, provides that a person * * * engaged in the business of renting or leasing motor vehicles to be operated upon the public highways shall be subject to the provisions of this section. This section so far as it requires bonds to be filed by persons carrying passengers for hire in motor vehicles has been held to be valid and constitutional. (*People* v. *Martin*, 203 App. Div. 423, affd. 235 N. Y. S. 50, *Packard* v. *Banton*, 264 U. S. 140.)

"A person engaged in the business of leasing automobiles has the vehicles registered in his name. If the automobile so used were involved in an accident it might be difficult or impossible to determine who was operating the car at that time. The records kept by the lessor

might not be complete and might not show to whom the car was leased or the lessee might have given a fictitious name.

"I believe that the owner of an automobile who leases it to an incompetent driver or an irresponsible person should be required to indemnify those who are injured as a result of the negligence of the operation of such a vehicle. This statute will tend to prevent men engaged in such business from renting automobiles to those who are immature or imprudent, unskillful or inexperienced in the operation of such vehicle and they will be likely to use care to see that their automobiles are operated by fit and prudent drivers. Certainly if it is reasonable and proper for the legislature to require owners of taxicabs to file indemnity bonds, such provision may also be applied to those owning automobiles which are leased to be operated by the lessee. In both cases the cars are driven by other than the owners, both are using the streets for private gain. The use of the streets for the purpose of gain is special and extraordinary and generally at least may be prohibited or conditioned as the legislature deems proper."

The Welch case is a clear-cut decision upon the very questions which are before the court in this case. It is of no importance to point out, as counsel for plaintiffs does in his brief, that in the New York case the regulation was provided by a State statute whereas we are concerned with a municipal ordinance. Once having established that the driverless automobile business is subject to regulation under the police power, it

necessarily follows that this regulation may be either by the State or by municipal corporations under their home-rule authority. *The Supreme Court of Ohio has, in fact, in numerous decisions held that that power of municipalities to regulate and control extraordinary uses of their own streets is even more extensive than the power of the State.*

Billings v. *Railway Co.*, 92 O. S. 478:

In this case the court held that a charter municipality, as an incident of local self-government and the right of control over its streets, had the power to grant permission to a company to operate a street railway and that the charter provisions which authorize the granting of such permission without the consent of abutting property owners was valid even though general statutes of the State require such consent to be obtained.

Froelich v. *City of Cleveland*, 99 O. S. 376:

In this case an ordinance of the city of Cleveland prohibited a vehicle carrying more than ten tons in weight including the weight of the vehicle from operating over the public streets of the city. General statutes of the State limited loads to be carried on public streets and highways to twelve tons. The court held that an ordinance was a proper exercise of the city's power of local self-government and was enforcible within the city regardless of different provisions of the State law.

Murphy v. *Toledo*, 108 O. S. 342, 140 N. E. 626:

"Syllabus 1. Municipalities have full power to regulate or control the use of their own streets."

In support of the argument that the business of the plaintiffs is a private business and not a public business which can be regulated, opposing counsel cites the cases of *State* v. *Bee Hive Auto Service Co., Inc.*, 242 Pac. 384; *Smallwood* v. *Jeter*, 244 Pac. 149; and *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570. A reading of these cases discloses that they are all decisions to the effect that legislation which is designed to cover common carriers or public utilities does not apply to concerns renting or leasing automobiles for the reason that these concerns are not common carriers or public utilities and cannot be made so by judicial fiat. We have no dispute with this conclusion. In other words, it is clear that driverless automobile companies are not public or private *common carriers* and therefore cannot be regulated under a statute or ordinance which attempts to regulate such carriers. The person who rents the car does his own driving and is not being carried as a *passenger* by the company owning the car. The Cincinnati ordinance recognizes this fact in Section 65-1*e* which defines the driverless automobile as a public vehicle rented or hired out to a person other than the owner and operated by the person renting or hiring the same for his own use and not for the purpose of transporting persons for compensation. However, even with the elements of the transportation of *passengers* eliminated,

the fact remains that their automobiles are being operated over the streets for a purpose of transporting the lessee or rentee and thereby to enable the owner to derive from this special use of the streets private profit. This is the element which brings the business under the police power regardless of whether it is a common carrier or a public utility or not.

None of the cases cited by counsel for plaintiffs expressly covers the operations of driverless automobiles. Had such vehicles been treated as they are under the Cincinnati ordinance instead of an attempt being made to include them under a classification of common carriers, a different conclusion would, in all probability, have been reached by the courts.

In other words, the cases cited by opposing counsel do not decide that it is beyond the power of a city or State to regulate driverless vehicles, but merely that a regulation specifically directed against common carriers and automobiles transporting passengers cannot be enforced against driverless automobile companies since these are not common carriers and do not transport *passengers*. These decisions, correct as they may be, have nothing to do with the issues in this case.

2. There is no right to use the streets for private gain, but such use may be regulated and even prohibited by the municipality under its police power and under express statutory authority.

The city of Cincinnati derives its power to regulate its streets from Section 3 of Article XVIII of the Constitution (the home-rule provision) and General Code,

Sections 3714 and 3632. These provisions read as follows:

> "*Article XVIII, Sec. 3.* (POWERS.)—Municipalities shall have authority to exercise all powers of local selfgovernment and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."
>
> "*General Code, Sec. 3714.* Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance."
>
> "*General Code, Sec. 3632.* (VEHICLES, AND USE OF STREETS.)—*To regulate the use of carts, drays, wagons, hackney coaches, omnibuses, automobiles, and every description of carriages kept for hire or livery stable purposes; to license and regulate the use of streets by persons who use vehicles, or solicit or transact business thereon;* to prevent and punish fast driving or riding of animals, of fast driving or propelling of vehicles through the public highways; to regulate the transportation of articles through such highways and to prevent injury to such highways from overloaded vehicles, and to regulate the speed of interurban, traction and street railway cars within the corporation."

These constitutional and statutory provisions grant ample power to the city to exercise regulatory control

over those who make a special or private use of the streets.

Section 3632 seems to us to be determinative of the questions in this case. We do not see how the plaintiffs can escape from the clear and express provision of the section. This is the section referred to by the Court of Appeals of Ohio in the recent decision sustaining the city's regulation of bus drivers. *Klein* v. *City of Cincinnati,* 30 O. L. R. 217, Ohio Law Reporter and Bulletin, September 16, 1929. The Supreme Court of Ohio overruled a motion to certify in this case.

In the case of *Rowe, Jr.* v. *Cincinnati,* affirmed by the Supreme Court of Ohio in 117 O. S. 382, it was held that the city, under its general police power, could prohibit persons from maintaining gasoline pumps upon the sidewalks. At page 392 of the Supreme Court opinion, the Court said:

> "Since the plaintiff in error has no right derived from any source to the permanent use of the streets for his private purposes, no property right is involved in the controversy, and no constitutional right will be invaded by the removal of the pump."

In *Packard* v. *Banton,* 264 U. S. 140, the court upheld the validity of a statute of New York requiring operators of vehicles for hire to file security or insurance to indemnify persons damaged by the operation of such vehicles.

At page 144 this Court makes this statement:

> "The contention most pressed is that the Act unreasonably and arbitrarily discriminates

against those engaged in operating motor vehicles for hire in favor of persons operating such vehicles for their private end, and in favor of street cars and motor omnibuses. If the state determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire, there is nothing in the Fourteenth Amendment to prevent. The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary, and generally at least, may be prohibited or conditioned as the legislature deems proper."

This proposition of law that streets are for the public and cannot be burdened by those seeking to secure a profit from their use except under regulation is so well established that it is needless to multiply quotations from the numerous cases in which the rule has been applied. We cite just a few of these cases.

Fifth Avenue Coach Co. v. *New York City*, 221 U. S. 467.
Pacific Express Co. v. *Seibert*, 142 U. S. 339, 353.
Nolan v. *Reichman*, 225 Fed. 812, 818:
Schoenfeld v. *Seattle*, 265 Fed. 726, 730.

It should be noted that appellants themselves recognize that they do not operate their vehicles as a matter of right. In their petition appellants plead that "each of said plaintiffs has paid to the city of Cincinnati the required license fee on each of their automobiles for the privilege of operating their said

vehicles in the city of Cincinnati'' and in the next paragraph ''and by virtue of Ordinance No. 89 of the Ordinances of the city of Cincinnati, passed on February 20, 1929, and effective immediately, applications were made by each of said plaintiffs for licenses from March 1, 1929, to December 31, 1929.'' If the arguments of counsel were sound, that is, that appellants are engaged in a purely private business, there would obviously be no necessity for these companies to secure licenses from the city or to make application therefor. The fact that they have done so, and that appellants pray in their petition that the city ''be enjoined from revoking these licenses,'' can only indicate that plaintiffs themselves recognize that their business is carried on pursuant to a privilege and not a legal right.

3. The requirement of insurance or surety bond does not violate any constitutional provisions nor directly or indirectly create liability without fault.

The question of the constitutionality of the insurance and surety bond provisions of the Cincinnati ordinance is by no means a novel one. A large body of case law has grown up around this very proposition, and the unanimous opinion of the courts in which the question has been presented is that legislation of this type violates no constitutional provisions. These decisions rest upon the ground that measures which tend to require that drivers of vehicles be financially responsible for injuries resulting from their negligent acts have a direct and substantial relation to the protection of the public safety and health because they

necessarily tend to make such drivers more careful in the operation of their cars.

The Ohio Supreme Court said in its opinion in this case (175 N. E. 199):

> "The police power, in furtherance of public safety, health, and welfare, is coextensive with the public need, and the reasonableness of its exercise must be measured largely by the same standard. The daily toll of life, limb, and property exacted by the operation of automobiles generally upon the public streets and highways proclaims the public need for police regulation of all automobile operation. Because, perchance, the ordinance in question might well have regulated other classes of automobile users, or because, perchance, such regulation might more effectually have been accomplished by state regulation, does not militate against the power to regulate a proper and reasonable class of automobile users, nor against the power of a municipality, expressly conferred, to enter upon an unoccupied field within its own jurisdiction. *Truax* v. *Corrigan,* 20 Ariz., 7, 176 P., 570; Id., 257 U. S., 312, 42 S. Ct., 124, 66 L. Ed., 254, 27 A. L. R., 375; *People* v. *Martin, supra; Packard* v. *Banton, supra; Murphy* v. *City of Toledo,* 108 Ohio St., 342, 140 N. E. 626.

The Supreme Court of Ohio in the case of *State, ex rel., McBride* v. *Deckebach,* 117 O. S. 227, recently passed upon this question in connection with those sections of the same ordinance now before this court requiring insurance as a condition precedent to the

operation of taxicabs in the city. These provisions are exactly the same as those involved in this case. The court held as follows:

> "*Syllabus 1.* Sections 702-2c and 702-2d (which are now by amendment Sections 65-7, 65-8, 65-9, 65-10, of the ordinance before this court) of the Code of Ordinances of the city of Cincinnati, which require an applicant for a license to operate a taxicab within the city of Cincinnati to furnish the city auditor of Cincinnati with a policy of insurance or in lieu thereof with a surety bond executed by responsible individuals or by a company authorized to write such bonds indemnifying such operator against loss or injury from the negligent operation of such taxicab, are valid and constitutional.
>
> "*Syllabus 2.* Under Article XVIII, Section 3, of the Ohio Constitution, a charter municipality has power to require a taxicab operator to furnish insurance or bond indemnifying such operator against loss or injury from the negligent operation of his taxicab as a condition precedent to the issuing of a license to operate such taxicab on the city streets."

Mr. Justice Brandeis, speaking for this court, in *Kane* v. *New Jersey,* 242 U. S. 160, 167, said:

> "The power of a state to regulate the use of motor vehicles on its highways has been recently considered by this court and broadly sustained. * * * It includes the right to exact reasonable compensation for special facilities afforded as well as reasonable provisions to ensure safety."

And in *Sprout* v. *South Bend*, 277 U. S. 163, 171, this court said:

> "Objection under the commerce clause is made also to the requirement of liability insurance. There being grave dangers incident to the operation of motor vehicles, a state may require users of such vehicles on the public highways to file contracts providing adequate insurance for the payment of judgments recovered for certain injuries, resulting from their operation. *Packard* v. *Banton*, 264 U. S. 140. Compare *Kane* v. *New Jersey*, 242 U. S. 160, 167; *Hess* v. *Pawloski*, 274 U. S. 352; *Clark* v. *Poor*, 274 U. S. 554, 557. It may consistently with the Federal Constitution, delegate by appropriate legislation a part of this power to a municipality."

And in *Hess* v. *Pawloski*, 274 U. S. 352, 356, Mr. Justice Butler speaking for this court, said:

> "Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways."

In *Ex parte Cardinal*, 150 Pac. 348 (California), an ordinance of San Francisco provided that the owners of jitney buses should give a bond in the sum of $10,000 as surety for the payment of all injuries on account of negligent operation. The court held

that such an ordinance was within the police power of the city. At page 350 the court says:

> "We see no reason to doubt the power of the state or any county or municipality in the exercise of its police power of regulation, to require security in the shape of a bond or insurance policy from its licensees, in all cases where the giving of such security may fairly be held to be a reasonable requirement for the protection of the public. If the power to do this exists we are satisfied that it cannot properly be held by the court that the requirement of such security by the ordinance before us was an unreasonable exercise of its power by the Board of Supervisors of San Francisco.
>
> "In the case at bar we have persons undertaking to pursue upon the public streets of the city and the county of San Francisco, an occupation that if negligently conducted, is fraught with danger not only to those who may be passengers but also to the public generally upon those streets. The occupation is one that may properly be regulated by the public authorities, and the insistence of a bond or other security in a reasonable amount to indemnify those who may be injured by the negligence or a legal operation of the business, appears to us not to be beyond the range of reasonable requirement."

Other cases to the same effect, holding that legislation such as that involved in this case is neither a denial of due process of law nor of the equal protection of the laws, are as follows:

People v. *Martin,* 197 N. Y. S. 28, aff'd 235 N. Y. 550.

Packard v. *Banton,* 264 U. S. 140.
City of Dallas v. *Gill,* 199 S. W. 1144 (Texas Civil Appeal 1917).
Hazelton v. *Atlanta,* 144 Ga. 775, 87 S. E. 143.
West v. *City of Asbury Park,* 89 N. J. L. 402, 99 A. 190.
Commonwealth v. *Theberge,* 231 Mass. 386, 121 N. E. 30.
Houston v. *City of Des Moines,* 176 Iowa 455, 156 N. W. 883.
State v. *Seattle Taxicab & Transfer Co.,* 91 Wash. 416.
Melconian v. *Grand Rapids,* 218 Mich. 397.
Lane v. *Whitaker,* 275 Fed. 476, 480.
See also note collecting cases 22 A. L. R. 230.

The decisions in the above cases do not depend upon the fact that the regulation was directed against common carriers, but the opinions all indicate that the courts upheld the enactments because they constituted proper police regulations of persons and firms who were making a private and special use of the streets, as distinguished from ordinary public uses and because the regulations were promotive of the public welfare and safety.

As we have shown above, the first of these elements, the extraordinary use of the streets, is present in the driverless automobile business. The second of these elements, the protection of the public safety and welfare, is, we submit, even more apparent in insurance requirements for damages caused by driverless automobiles than in similar requirements for taxicabs and jitney buses. The taxicab operator is directly under the control of the company owning the car. He is a

person of assured driving ability because he has passed all the tests necessary to obtain a license from the city before he can drive. Moreover, he is in practically all cases a resident, he is compelled to make a report to his company of all accidents, and he can be easily located, if need be, after an accident. The driverless companies lease their cars indiscriminately to persons who may apply and who can leave the small deposit required; there is no assurance that the person is a careful, prudent, and experienced driver, except his own answers to the perfunctory questions about his driving ability which the company asks him; he is almost in all cases financially irresponsible; he frequently is not a resident of the city and therefore is not accessible for information or service of process after he has caused an accident; it is frequent that he uses a fictitious name in renting the car, and there is no method of compelling him to report accidents. In fact the danger to the public, and the possibility of damage through the operation of these driverless cars, is so great that one of the witnesses for the plaintiffs (Mr. Curry) frankly stated from the witness stand that in his opinion "*the driverless automobile is the greatest menace on the streets today*" (R., p. 48). This is further eloquently corroborated by the testimony that a number of insurance companies have found this business to involve so great a risk that they refuse to write insurance for these concerns. If this business is attended with such great possibility of damage and injury to persons lawfully using the highways, so that companies whose business is the writing of insurance will not take the risk in-

volved in insuring these concerns, it seems to us highly reasonable that the city under its police power can properly take cognizance of this matter and provide a regulation that will both cause the companies to be more careful in the renting of their machines, and assure persons who may be injured thereby of compensation upon the establishment of the legal liability of the driver of the car.

Recognizing that the necessity for the regulation of the driverless automobile is equally as urgent as regulation of taxicabs and jitney buses, the courts in which this question has arisen, have all extended the principles adopted in the taxicab cases to driverless automobile companies.

San Antonio v. *Besterio,* 209 S. W. 472.

Welch v. *Hartnett,* 215 N. Y. S. 541, 127 Misc. Rep. 221.

A. The Ordinance Does Not Create Liability Without Fault.

Counsel for the appellants contends that since the companies are not liable for damages caused by people who rent their cars, a requirement that they deposit with the city insurance covering the liability of the company and the liability of the driver of the car as well has the effect of compelling companies to assume liability without fault. This argument is clearly fallacious. The ordinance in no sense increases the liability of driverless automobile operators, or creates rights of action which did not exist before the passage of the ordinance. The general rules

of tort liability are in no way changed by the ordinance. The injured party has no greater legal right by reason of this ordinance than he has without it. The ordinance simply makes the plaintiffs and those who rent their cars *responsible judgment creditors.*

This will come more clearly into focus if we suppose the ordinance to provide that before a company may have a license to rent out cars it must satisfy the auditor of its financial responsibility and the fact that the persons to whom it rents its cars will also be financially responsible. Such a provision is in effect a provision of the ordinance in question. It would add nothing to the remedial laws of the State. It would only require a man to assure the city before he enters a business that may well cause damage to others, that he and the persons who rent his cars to be driven over the streets, be in a financial position to meet the requirements of the State law. The injured party under such a provision would proceed exactly as he does without the ordinance. He would secure a judgment in accordance with common law principles of tort liability. In fact he would take every step under the law of the State that he would if the ordinance did not exist. The only difference is that by reason of the requirement that the licensee be financially responsible and see to it that those to whom he leases his cars are financially responsible, there is created a condition of fact whereby the legal remedies created by the general State law are given substance. The injured party is actually compensated for the injury done instead of having a mere empty and meaningless right

to obtain a worthless judgment against a financially irresponsible party.

Although the company is compelled to pay the premium for the insurance in the first instance, this cost will, in practice, be borne by the persons who rent the cars either directly by the payment of an insurance charge or indirectly by the inclusion of this cost in the rental fee.

We submit, therefore, that the argument that the ordinance is remedial or imposes liability upon the plaintiffs without fault or negligence is entirely without merit. The ordinance does not either directly or indirectly create any new remedy or increase plaintiffs' legal responsibility, and, therefore, does not pretend to invade that authority to establish general laws which is the exclusive province of the State.

Counsel for the plaintiffs has referred to the case of *Genusa* v. *Houston,* 10 S. W. (2d) 772. This case, which followed the other Texas case cited above in this brief, *San Antonio* v. *Besterio,* held that the insurance provisions of the San Antonio ordinance were invalid. When we examine this case we find that the ordinance involved was essentially different from the Cincinnati ordinance. Section 194 of the San Antonio ordinance read, in part, as follows:

> "* * * The principal (that is, the automobile company itself) shall pay all legal damages for injuries sustained by any person, including injuries resulting in death, caused by or on account of the negligence or willful act of the principal or operator of the car.

> * * * Said bonds or insurance policies shall provide *that suit may be brought thereon directly in connection with the principal* in any and all causes of action covered by its provisions."

It is thus apparent that the San Antonio ordinance attempted to change common law rules of tort liability, in that it enables a person injured by a "driverless auto" to bring an action *directly against the company owning the car,* although there was no agency or respondent superior relation, but merely a relation of bailor and bailee. Obviously this was an attempt by ordinance to change general laws of tort responsibility established by the State, and for that reason we believe the court was entirely correct in striking down this legislation.

The Cincinnati ordinance, however, has no such objectional features. *It does not authorize an injured party to bring a suit against the company.* Injured persons can proceed only against the rentee or driver of the car. The company cannot be brought into the case in any way. But if a judgment is obtained against the rentee, this judgment must be paid by the insurance company which insures *his* liability.

This example may bring this point out more clearly. The ordinance requires insurance to the extent of $5000 for injuries or death of any one person in one accident. Now if Mr. Jones rents a car from The Hodge Company and through his negligence injures Mr. Smith, Mr. Smith may then sue Mr. Jones and no one else. If he gets a judgment of $10,000 against

Jones the insurance company stands good up to $5000. for the additional $5000, Mr. Jones himself is liable. The Hodge Company cannot be made to pay.

Under the San Antonio ordinance, however, Mr. Smith, in the first place, could sue the Hodge Company directly, and in the second place, he could collect from them the balance of his judgment over the amount of the insurance policy.

We submit that the differences between these ordinances make the Texas case totally inapplicable to the case at bar.

B. The Ordinance is not a Denial of Equal Protection of the Law.

Counsel for the plaintiffs argues in his brief that to require operators of driverless automobiles to provide insurance and not to require the owners of other vehicles such as trucks and private automobiles is arbitrary and in violation of the equal protection provision of the Constitution.

The question of creating classes to whom laws may apply has been before the courts many times and upon this subject the Supreme Court of the United States in *Truax* v. *Corrigan*, 257 U. S. 312, 337, has said:

> "In adjusting legislation to the needs of the people of the State the legislature has a wide discretion and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary.

> * * * Classification is the most inveterate of our reasoning processes. We can scarcely think without consciously or unconsciously exercising it."

The right of a city to make its laws applicable to one class of persons and not to another has been passed upon by so many courts and is so well established that we feel it unnecessary to cite further authority. The only remaining question, therefore, is as to the reasonableness of the present ordinance. The authorities are uniform in upholding the type of classification involved here.

In *People* v. *Martin*, 197 N. Y. S. 28, 30, the court said:

> "It is contended that the legislature in this legislation has made a classification which is so arbitrary and unreasonable as to render the statute violative of Section 1 of the Fourteenth Amendment of the Constitution of the United States. This contention is based upon the claim that the act imposes a burden on the owners of taxicabs while exempting other persons similarly circumstanced. But it cannot be assumed that the legislature acted without information justifying the classification, and reasons will at once suggest themselves why it is desirable that the public shall be protected to the extent of being able to recover some amount of damages from the owners of such vehicles, which have been responsible for so many injuries in the public streets of New York City, and even deaths therein as the records show."

In *Packard* v. *Banton,* 264 U. S. 140, above cited, this court held a statute requiring persons engaged in the business of carrying persons for hire in motor vehicles upon the streets is:

> "Not in violation of equal protection of the laws, either because it applies to only cities of the first class, or because it does not apply to persons operating motor vehicles for their own private ends, or because it does not apply to street cars and omnibuses which are regulated under another law."

In the case of *Ex parte Cardinal,* 150 Pac. 348, the court discusses at length and sustains the reasonableness of an ordinance requiring the payment of a license fee by jitney buses and the giving of an indemnity bond although there was no similar requirements for other motor vehicles.

In *Murphy* v. *Toledo,* 108 U. S. 342, the court says:

> "*Syllabus 2.* In such control (of the streets) or regulation a municipality may make any reasonable classification of vehicular traffic in the use of its streets.
>
> "*Syllabus 3.* The judgment of a legislative body as to a reasonable classification cannot be questioned, except when it is in clear conflict with some express provision of State or Federal Constitutions."

4. The ordinance is not oppressive or unreasonable.

It is contended that the ordinance is impracticable, unworkable, and oppressive in that it requires insurance which the plaintiffs cannot obtain. The evidence,

we believe, clearly shows that this is not the fact. While it is true that a number of insurance companies will not write this type of business because of the great risk involved, there are other companies from whom such insurance could be obtained. The evidence shows that there are at least three driverless companies in Cincinnati, the Kissel-Skiles Company, the Saunders Company, and the Bohannon Company, which have been carrying this type of insurance for a number of years and have all filed policies with the city under the new ordinance. These concerns secure their insurance from three different companies. The testimony is that one of these companies, The General Casualty & Surety Company of Detroit, will not write any more of this insurance in addition to that it now has. However, there is no showing that the plaintiffs cannot obtain insurance either from the Utilities Indemnity Company of St. Louis or The Employers' Indemnity Company of Kansas City.

In addition, the testimony shows that the Mercer Company will write this type of insurance, in fact, the agent for the Mercer Company had carried on negotiations with several of the plaintiffs until they informed him that they were not going to get this insurance until the decision of this case. Counsel for the plaintiffs complains that the Mercer Company is a small company and is irresponsible. There is no evidence of this fact. There is no evidence that this company has ever failed to pay judgment rendered against one of its policyholders. Furthermore, the question of the sufficiency of the policy is entirely a

matter for the city treasurer to pass upon. There is no question but that these companies could obtain the necessary insurance if they desired, but, of course, they do not wish to do so if they can prevent it through this proceeding. *Moreover, the ordinance allows as an alternative to insurance, both surety bonds and personal sureties. There is no evidence that these forms of security cannot be obtained.*

In reference to the prohibitive cost of insurance we will content ourselves merely with pointing out first, that the premium is over 50 per cent *less* than the premium for taxicab insurance, and, second, that the testimony shows that the Saunders System, which has carried this type of insurance required by the Cincinnati ordinance for several years recently *reduced its rates below that of the plaintiffs' its local competitors.* The claim that plaintiffs cannot comply with the terms of the ordinance is wholly fictitious. However, even if there were some basis for this contention, it would not be an argument against the validity of the ordinance. Similar claims have been advanced in a number of cases, and the response of the courts has invariably been that the power to license necessarily includes the power to prescribe conditions for obtaining the license, and the courts cannot limit these conditions to the capacity of the licensees to comply with them. See *People* v. *Martin*, 203 App. Div. (N. Y.) 423.

In *Auto Transit Co.* v. *Fort Worth*, 182 S. W. 685, the court said at page 692:

> "Nor does the fact that the plaintiffs herein are not in a position to comply with the terms

> and provisions of the ordinance under discussion, of itself, establish the invalidity or unreasonableness of such ordinance. It is true that the provision requiring a surety bond may necessitate the incurrence of an expense which the plaintiffs may not be able to bear, and that therefore they will be required to abandon the operation of their motor buses, but that of itself does not establish the unreasonableness or invalidity of the ordinance."

In *Puget Sound Traction Company* v. *Grassmyer,* 173 Pac. 505 (Wash. 1918) the defendant was charged with violating a provision of the State law requiring jitney companies to deposit bonds with the State. The defendant claimed that it was impossible to comply with the provisions since they could not get the type of bond required. At page 507 of the opinion the court replies to this contention:

> "Again it is said that the bond required is impossible of procurement. * * * Conceding this to be true it would not constitute a defense. This we have held in the recent case of *Hadfield* v. *Lundin,* 98 Wash. 657."

In *Hadfield* v. *Lundin,* 168 Pac. 516 (Wash.), a case involving public vehicle insurance, the court says at page 519:

> "It is urged that the statute is unconstitutional in that it deprives appellant of his liberty and property without due process of law and in that it deprives him of equal protection of the laws. We have twice held this law constitutional. But it is argued that in neither of these cases did it appear that the bonds of

the character prescribed by the law could not be procured, which fact does appear in the records now before us, and which, it is asserted demonstrates the unconstitutionality of the law. We shall confine our discussion to a consideration of that question. * * *

"The use of the streets as a place of business is accorded as a mere privilege and not as a matter of natural right. Since the use of the streets in the prosecution of business as such is not a right but a mere license or privilege, it follows that the legislature may prohibit such use entirely without infringing any provision either of the State or Federal Constitution. * * * Nor can it be questioned that the power to prohibit includes the power to regulate even to the extent that the regulation under given conditions may be tantamount to a prohibition. Where the power exists the reasonableness of the regulation is a legislative question pure and simple. To hold otherwise would be to assert an absurdity * * * the expediency of the action is not a question for the court.

"The complaint before us shows that the statute in question not only could be complied with but that for over a year was complied with by appellant himself. If, as asserted, appellant is now unable to meet these requirements because of the character of the bond required by the act cannot be secured, then he is not entitled to the privilege, which the statute grants, and this simply because the grant was conditioned upon the meeting of those requirements."

In *Packard* v. *Banton*, 264 U. S. 140, at page 145, the court says:

> *"Affidavits filed below on behalf of appellees tend to show that insurance policies in mutual casualty companies may be secured for $540.00 a year; and that operators of upwards of a thousand cars furnish personal bonds. The fact that, because of circumstances peculiar to him, appellant may be unable to comply with the requirement as to security without assuming a burden greater than that generally borne, or excessive in itself, does not militate against the constitutionality of the statute. Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance of permission. In the latter case the power to exclude all together generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former."*
>
> See also *Nolen* v. *Riechman*, 225 Fed. 812; *State* v. *Transfer Co.*, 90 Wash. 416.

5. Other contentions of plaintiffs and comments on plaintiffs' authorities.

Plaintiffs attack Section 65-48 of the ordinance which provides in substance that whenever the City Treasurer has suspended or revoked a public vehicle license the applicant may appeal to the City Manager and the decision of the City Manager shall be final. It is argued that this section vests final judicial authority in the City Manager, an administrative officer, and in effect prevents recourse to the courts. The absurdity

of this argument is palpable. Recourse to the courts is always available to those who believe they have been injured by an abuse of discretion of an administrative officer in refusing to issue a license or permit. If this section were not in the ordinance, the final authority to issue and revoke permits would then be lodged in the Director of Public Utilities of the city of Cincinnati, and those against whom an unfavorable decision was made by the Director would have no greater right to apply to the court to set aside such decision than they now have when the final decision is made by the City Manager. In fact, the provision is made for the benefit of applicants because it provides for an administrative review of a decision of the Director, and that gives the applicant two chances whereas without the section he would only have one. Furthermore, these sections have already been held valid by the Court of Appeals of Ohio in *Klein* v. *City,* 30 O. L. R. 217.

> "It is further claimed that the ordinances vest judicial power in executive officers of the city. The revocation of a license is not a judicial act."

We have already distinguished many of the cases cited by opposing counsel. In his argument in the court below, counsel placed considerable reliance on the case of *City of Rockford* v. *Nolan,* 316 Ill. 60, stating that this case held that "driverless auto companies" are private businesses and therefore not subject to regulation (counsel cites this case at pages 32 and 33 of his brief in this court). The case holds nothing of the kind. The case merely holds that an

Illinois city, which has no home-rule authority similar to municipalities in Ohio, derives its power solely from the State statutes, and if these statutes do not clothe a city with power to regulate a certain type of automobile for hire, the city cannot enact such regulation. Syllabus 1 contains the reason for the court's decision:

> "A municipality possesses no inherent power but its existence and its power are derived from the General Assembly, and in order to legislate upon or with reference to a particular subject or occupation it must be able to point out the statute which gives it the power so to do."

Because of the Ohio Home-Rule provisions and also because of G. C. 3632, above quoted, the reasons for the decision in the Illinois case do not apply here.

Despite the fact that counsel for plaintiffs, as appears from the long list of cases in his brief, made an exhaustive search of the authorities, he does not cite a single case in which a regulation of driverless automobiles similar to the Cincinnati ordinance has been declared unconstitutional by the courts.

The ordinance is presumed by law to be constitutional and the burden is on the plaintiffs to show that the ordinance has no real or substantial relation to the public welfare and safety before the court can invalidate it.

Powell v. *Pennsylvania*, 127 U. S. 684.
Cusak v. *Chicago*, 242 U. S. 526.
Pritz v. *Messer*, 112 O. S. 628.

In the last mentioned case at page 638 the court states the rule as follows:

"As a preface to our discussion of this question we must remind ourselves that the test is not whether this court, sitting as a city council, would have enacted the ordinance challenged. The members of this court may or may not conceive that such an ordinance is wisely calculated to preserve the public health, morals or safety. If the ordinance discloses no purpose to prevent some public evil or to fill some public need, and has no real or substantial relation to public health, morals and safety, it must be held void. When, however, legislation does have a real and substantial relation to the prevention of conditions detrimental to the public health, morals, or safety, no matter how unwise the measure itself seems to individual judges, it is not fair for the judicial tribunals to nullify it upon constitutional grounds."

The appellants in error cite *Hissem* v. *Guran*, 112 O. S. 59. It is submitted that the Hissem case stands only for the proposition that the defendant in that case did not constitute a common carrier and that one who is a private carrier in fact could not be converted into a public utility or common carrier by mere legislative fiat. It is our contention, then, that the principles laid down in the Hissem case are in no way applicable to the case at bar. As a matter of fact the Hissem case was distinguished by this court in *Craig* v. *Public Utilities Commission*, 115 O. S. 512, where this court said:

"Where an owner of trucks employs the same partly in the prosecution of his own business and partly in hauling goods and merchandise for the public for hire, there is a partial dedica-

> tion of such property to the public service, and, to the extent of such dedication and such use, the hauler is a 'common carrier'."

This doctrine was followed in *Coleman* v. *Public Utilities Commission,* 115 O. S. 638. See also *Breuer* v. *Public Utilities Commission,* 118 O. S. 95.

The case of *Motor Freight, Inc.* v. *Public Utilities Commission,* 120 O. S. 1, we submit, has no bearing upon the case at bar. In that case the question for decision was whether or not the plaintiff was a common carrier and did not in any way involve the question of the power of a municipality to regulate and control motor vehicles which used the streets of the municipality to an extraordinary extent for private gain.

Conclusion.

We have shown that the business of renting driverless automobiles necessarily and essentially involves the use of the public streets for private profit whether or not such automobiles constitute common carriers; that such use of the public streets is not a legal right but a mere privilege which may be regulated and, in fact, even prohibited by the municipality; that the regulation imposed by the ordinance is directly, vitally, and intimately connected with the protection of the public safety and welfare; that similar regulations covering taxicabs, jitney buses, motor buses, and automobiles for hire have been uniformly sustained by the courts including the United States Supreme Court; that the principles in these cases are precisely similar to those involved in the present case, and, in fact, have been extended to regulations specifically cover-

ing driverless automobile companies in all the cases in which this precise question has been before the court; that the ordinance does not deprive the plaintiffs of due process of law since they can assert no legal right which the city has invaded; that the ordinance does not deny to the plaintiffs the equal protection of the laws since the classification made is reasonable and justifiable and the provision applies equally to all the members of this class; that the ordinance in no sense creates liability without fault or adds to remedies or rights of action which have been provided by the ordinance; and finally that the ordinance is presumptively constitutional and must be sustained unless it manifestly appears that it is purely fanciful, arbitrary, and unrelated to the promotion of the public good.

In view of the appalling record of deaths and injuries resulting from the negligent operation of automobiles in this city, we submit, that the complaint of the plaintiffs that if the ordinance is enforced against them they will be unable to make as much profit from the rental of the city streets as they now make should not defeat the city's attempt to make its streets more safe for its citizens and to provide some measure of compensation for injuries caused by the negligent and irresponsible driver.

Respectfully submitted,

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JACOB HAUPTMAN,
Asst. Solicitor,
Attorneys for Appellees.

(1339)

SUPREME COURT OF THE UNITED STATES.

No. 63.—October Term, 1931.

The Hodge Drive-It-Yourself Company, The Barrs Self Driver Company, Inc., and Durken Drive-It-Yourself, Inc., Appellants, *vs.* The City of Cincinnati, Russell Wilson, Clarence Dykstra, et al.	Appeal from the Supreme Court of the State of Ohio.

[January 4, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

The appellants sued the city, its mayor and other officers in the court of common pleas of Hamilton county to enjoin the enforcement of ordinance No. 50-1929 on the ground of repugnancy to the due process and equal protection clauses of the Fourteenth Amendment. After a trial at which evidence was taken, that court found the provisions invalid and granted permanent injunction. The court of appeals tried the case *de novo* and sustained the ordinance; its judgment was affirmed in the highest court of the State. 123 O. S. 284.

The ordinance* classifies "driverless automobiles for hire" as public vehicles, imposes license fees for their use upon the streets

*"Sec. 65-1 b. The term 'public vehicles' shall apply to all vehicles furnishing individual service as a business in the transportation of persons, which are hereby classified as (1) public vehicles which seek their business, or a part thereof, on the public streets or quasi-public places, to wit: 'taxicabs,' and (2) public vehicles which use the public streets for the purpose of transporting passengers for hire, but which do not seek their business thereon, or in quasi-public places, to wit: 'autosforhire,' 'driverless autosforhire' and 'funeral cars.'

"Sec. 65-1 e. The term 'driverless autosforhire' shall include any public vehicles which is rented or hired out to a person other than the owner, and operated by the person renting or hiring the same for his own use and not for the purpose of transporting persons for compensation."

and requires persons engaged in the business of leasing such automobiles to deposit with the city treasurer insurance policies or bonds in specified sums for the protection of persons injured or whose property may be damaged as a result of lessees' negligent operation, maintenance or use of such vehicles.

Each appellant owns automobiles and is carrying on the business of leasing them, for compensation based on mileage, to be driven by the lessees on the city streets and elsewhere. Many insurance companies which formerly carried the risks specified in the ordinance decline to issue such policies; but some are offering rates, at the option of the insured, of $232.50 per vehicle per year or ten per cent. of the gross earnings which on the average amount to approximately $1,800 per year.

Appellants maintain that the measure constitutes an unreasonable interference with a purely private business and is not one for the regulation of the use of streets; that it attempts to convert appellants into public utilities and impose upon them liability without fault, and that it is discriminatory and oppressive.

Unquestionably appellants contemplate that those hiring their cars will operate them upon the streets. In fact such use of the streets is essential to appellants' business. It is a special and extraordinary use materially differing from operation of automobiles or trucks by owners or their chauffeurs in the usual way for private ends. The running of automobiles necessarily is attended by danger to persons and property in the vicinity; and, when they are negligently driven upon city streets, the peril is great. The court below found that the operation of automobiles by such hirers is extra-hazardous to the public. The State has power for the safety of the public to regulate the use of its public highways. *Hendrick* v. *Maryland*, 235 U. S. 610, 622. *Kane* v. *New Jersey*, 242 U. S. 160, 167. *Sprout* v. *South Bend*, 277 U. S. 163, 168. It may prohibit or condition as it deems proper the use of city streets as a place for the carrying on of private business. This Court has sustained a state law requiring reasonable security for the protection of persons in respect of injuries and losses caused by the negligent operation of motor vehicles engaged in carrying persons for hire. *Packard* v. *Banton*, 264 U. S. 140, 144. Cf. *Hess* v. *Pawloski*, 274 U. S. 352, 356. Such measures, so far as concerns constitutional validity, are not distinguishable from

the ordinance under consideration. *City of San Antonio* v. *Besteiro* (Tex. Civ. App.) 209 S. W. 472. *Welch* v. *Hartnett,* 215 N. Y. S. 540.

This ordinance is not an interference with or regulation of a business that has no relation to matters of public concern; it rests upon the power of the city to prescribe the terms upon which it will permit the use of its streets to carry on business for gain. It does not attempt to impose any burden or duty that is peculiar to public utilities. Our decisions in *Michigan Commission* v. *Duke,* 266 U. S. 570, and *Frost Trucking Co.* v. *R. R. Comm.,* 271 U. S. 583, do not apply here. Nor does the ordinance attempt to make hirers the agents or employees of the owners or to make the latter liable for the negligence of the former. It merely requires the giving of security that lessees shall "respond in damage for their own tortious acts." 123 O. S. —. There is no showing that the conditions imposed are arbitrarily burdensome or that the measure in any way operates to deprive appellants of property without due process of law.

There is nothing on the face of the ordinance or in the evidence or findings below to warrant the conclusion that the classification, § 65-1 b, is capricious, arbitrary or so lacking in foundation as to contravene the equal protection clause. *Truax* v. *Corrigan,* 257 U. S. 312, 333. *Power Co.* v. *Saunders,* 274 U. S. 490, 493. *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 400. The record fails to show that the enforcement of the ordinance does or will substantially discriminate against the business of appellants. The claim of repugnancy to the equality clause cannot be supported by mere speculation or conjecture.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.